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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 286.

THE WABASH RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN McDANIELS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED SEPTEMBER 28, 1880.

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1 *Complaint.*

Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house in the city of Indianapolis, in said district, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and seventy-nine, before the honorable Walter Q. Gresham, judge of the district court of the United States for the district of Indiana, and ex officio one of the judges of said circuit court.

JOHN MCDANIELS, COMPLAINANT,
vs.
THE WABASH RAILROAD COMPANY, ALIAS Wabash Railway Company, defendant. } 6700.

Be it remembered that heretofore, to wit, at the May term of said court, on the 15th day of August, A. D. 1879, in recess of said court, the plaintiff, by Alvah Taylor, esq., and Mess. Gordon, Lamb & Shepard, and E. E. McKay, esq., filed his declaration in the above-entitled cause in the words following, to wit:

John McDaniels complains of the Wabash Railroad Company, alias Wabash Railway Company, and says that at the times hereinafter mentioned the defendant, being then and there a corporation duly incorporated under the laws of the State of Indiana, were the owners of and
2 engaged in running a railroad known as the Wabash Railroad Company, alias Wabash Railway Company, together with the tracks, locomotives, cars, and other appurtenances thereto belonging, and were common carriers of passengers and freight between the cities of Toledo, Ohio, and St. Louis, Missouri, and at said times the complainant was in the employment of the defendant as a brakesman on said road.

That just before day on the morning of the 17th day of August, A. D. 1877, near the Belden bridge, between Antioch and Segro, on the line of defendant's said road, while the complainant, John McDaniels, was at his post of duty at the brakes on the top of the front car of first section of defendant's freight train No. 13, going west, without any fault or negligence of the complainant, but by and through the negligence of defendant and its servants, who were incompetent, carele s, untrustworthy, and unskilled in railroading, which was known to defendant at the time of their employment and since, a collision occurred between said section of said train and section 6 of defendant's freight train No. 16, going east, whereby both of said trains and the locomotives and cars thereof were thrown from the track, ditched, and wrecked, and thereby the complainant was caught in said wreck and bruised, battered, and torn upon the head, body, and limbs, his left leg broken and crushed, and himself rendered insensible, and by reason thereof complainant became
3 and for a long time was ill and sick, and suffered great and prolonged bodily and mental anguish and pain, and was compelled to have his leg amputated in order to save his life, and has thereby become a cripple for life and prevented from actively pursuing his business, and

was otherwise greatly injured and damaged, to wit, in the sum of twenty-five thousand dollars.

The said negligence of the defendant, and incompetency, carelessness, untrustworthiness, and unskillfulness of the servants of the defendant, whereby said collision occurred and said damage and injury to the complainant was occasioned, is more particularly described as follows, to wit:

Said section No. 1 of defendant's freight train No. 13 going west, on which the complainant was employed as brakesman as aforesaid, a short time before the collision, on its arrival at Huntington, received an order from defendant's general operator of its line at Ft. Wayne to run to Segro and wait for the 6th section of defendant's freight train No. 16 going east, and said train started at once in obedience to said order to go to Segro, and on its way passed section 5 of defendant's freight train No. 16 going east at Antioch. Said section 5 was proceeding eastward a short distance in advance of said section 6 of train No. 16, and was passed at Antioch by section 1 of train No. 13 as aforesaid. Before said section 5 of train
4 16 going east reached Wabash that morning, defendant's general operator at Ft. Wayne called, by telegraph, the operator of telegraph at Wabash, Willie McHenry, but said McHenry was asleep at his post of duty, and did not hear or respond to said call. Afterwards, as said section 6 of train No. 16 going east was passing Wabash, said McHenry awoke (said section 5 of said train No. 16 having passed going east while said McHenry was sleeping as aforesaid). After said section 6 of train No. 16 going east had passed Wabash, and before said section had reached Segro, defendant's general operator at Ft. Wayne telegraphed said McHenry at Wabash to know whether said section 6 had passed there going east, and said McHenry, mistaking said section 6 for said section 5, answered falsely, no, that said section 6 had not passed; and said general operator at Ft. Wayne, relying on said answer as true, did not stop said section 6 at Segro, which was a regular station on said defendant's said road, and where there was stationed by defendant, at the time, a night operator of telegraph, and said section 6 of said freight train No. 16 going east was not stopped at Segro by any order from said general operator at Ft. Wayne, which would have been done if said McHenry had answered truly that said section 6 had passed Wabash and was then on its way to Segro but said section 6 passed Segro and collided with section 1 of defendant's freight
5 train No. 13 going west, as hereinbefore set out.

Said Willie McHenry, the operator of telegraph at Wabash, by whose negligence and untrustworthiness said injuries complained of herein was occasioned, was negligent, incompetent, careless, untrustworthy, and unskilled in railroading or telegraphing for railroads, was a mere boy, and, by reason of his youth and general habits of life, was liable and subject to go to sleep on his post of duty in defendant's said employ in the night time, and was, by reason thereof, unreliable and untrustworthy as night operator as aforesaid, and had never been in defendant's or any other railroad employment theretofore, except that he had been in defendant's employ as night operator of telegraph for ten successive nights theretofore at Wabash on defendant's said road. Said injury to complainant was occasioned by said negligence, incompetency, carelessness, unskillfulness, want of experience, and untrustworthiness of the said Willie McHenry as af'd, and complainant says that said unskillfulness, incompetency, carelessness,

want of experience, untrustworthiness, and liability to be overtaken by sleep of said McHenry, by reasonable care on the part of the defendant, could have been known and was known by defendant at and before the time of his employment and during the time of his said employ-
6 ment by said defendant.

Complainant further says that the said negligence, incompetency, carelessness, untrustworthiness, want of experience, youthfulness, and liability to sleep in the night time of said Willie McHenry, being so capable of being known by reasonable diligence on the part of defendant, and being at the time so known to defendant and its accredited agents, that defendant negligently and carelessly, and in violation of its duty in the premises, engaged and employed said McHenry and continued him in its employ, as heretofore set out herein.

Complainant says that he is a resident citizen of the State of Kentucky, and a non-resident of the State of Indiana, and that by reason of the matters complained of herein he has been damaged twenty-five thousand dollars.

Wherefore he sues, and prays judgment for $25,000.00 damages for said injuries, & for other proper relief.

H. B. SAYLOR,
ALVAH TAYLOR, &
E. E. McKAY,
Att'ys for Complainant.

The complainant, John McDaniels, says the statements of the foregoing complaint made from his personal knowledge are true, and those
7 from information he believes to be true.

JOHN McDANIELS.

Subscribed & sworn to before me at Bardstown, Kentucky, by John McDaniels, this August 1st, 1879.

GEO. S. FULTON,
Notary Public, of Nelson County, Ky.

And thereupon there issued out of the office of the clerk of said court a summons in the words following, to wit:

UNITED STATES OF AMERICA,
District of Indiana, ss:

The President of the United States to the marshal of the district of Indiana, greeting:

You are hereby commanded to summon the Wabash Railroad Company, alias Wabash Railway Company, if it may be found in your district, to be and appear in the circuit court of the United States for said district, to be holden before the judges thereof, at Indianapolis, 15 days after service hereof, to answer unto John McDaniel, citizen of the State of Kentucky, in a civil action, damages $25,000; and have you then and there this writ.

Witness honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this 15th day of August, A. D. 1879.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

8 And afterwards, to wit, on the 20th day of August, 1879, the aforesaid summons was returned into the office of said clerk by the marshal, with his return endorsed thereon in the following words, to wit:

"District of Indiana: I received this writ at Indianapolis, in said district, at 3.30 o'clock p. m. on the 15 day of August, A. D. 1879, and served the same in Allen County, as follows: 16th day of August, 1879, by reading it to Kirtland H. Wade, superintendent of the Wabash Railroad, and handing him a copy of the same.

"WM. W. DUDLEY,
"*U. S. Marshal*,
"By CHAS. FISKE, *Deputy*."

And afterwards, to wit, at the May term of said court, on the 27th day of August, 1879, the defendant by Wager Swayne and C. B. Stewart, its attorneys, entered its appearance herein.

And afterwards, to wit, at the May term of said court, on the 18th day of September, 1879, the defendant by Mess. Baker, Hord and Hendricks, its attorneys, entered its appearance herein.

And afterwards, to wit, at the November term of said court, on the 13th day of January, 1880, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff by counsel, and upon his motion the defendant herein is ruled to answer on or before the 23d day of the present month.

9 And afterwards, to wit, at the November term of said court, on the 27th day of January, 1880, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant by C. B. Stuart and Baker, Hord and Hendricks, its attorneys, and files its answer herein in the words following, to wit:

The said defendant comes by C. B. Stuart and Baker, Hord & Hendricks, his solicitors, and for answer to the plaintiff's complaint denies all the allegations in the said complaint contained.

C. B. STUART &
BAKER, HORD & HENDRICKS,
Att'ys for D'f't.

And afterwards, to wit, at the November term of said court, on the 5th day of March, 1880, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff by Gordon, Lamb and Shepherd, and E. E. McKay, esq., his attorneys, and comes also the defendant by Gov. Baker and C. B. Stuart, its attorneys, and this cause coming on to be tried now comes a jury, to wit: Geo. W. Powell, W. D. Seaton, Jabez Smith, Daniel P. Monroe, Simeon Pierce, H. R. Pershing, Benj. B. Williams, John D. High-

way, John T. Patterson, John T. Cline, Benjamin F. Wilmore, and William P. Aldin, who, being duly empanelled and sworn, and having heard the statement of counsel and part of the evidence herein, are now by the court allowed to separate until the calling of this cause on to-morrow morning.

And afterwards, to wit, at the November term of said court, on the 6th day of March, 1880, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their respective attorneys, and also come the jury heretofore empanelled and sworn, and who, having further heard the evidence herein, are now by the court allowed to separate until the calling of this cause on to-morrow morning.

And afterwards, to wit, at the November term of said court, on the 8th day of March, 1880, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their respective attorneys, and at the same time comes the jury heretofore empanelled and sworn, and who, having heard the residue of the evidence and part of the argument of counsel herein, are now by the court allowed to separate until the calling of this cause on to-morrow morning.

And afterwards, to wit, at the November term of said court, on the 9th day of March, 1880, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come again the parties by their respective attorneys, and come also the jury heretofore empanelled and sworn, and who having heard the residue of the argument of counsel and the charge of this court, now return into court the verdict following, to wit: "We, the jury, find for the plaintiff and assess his damage at the sum of fifteen thousand ($15,000.00) dollars.

"JABEZ SMITH, *Foreman.*"

And afterwards, to wit, at the November term of said court, on the 10th day of March, 1880, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendant by its attorneys and files its motion herein for a new trial in the words following, to wit:

The defendant moves the court to set aside the verdict of the jury, and grant said defendant a new trial in this cause upon the following grounds and for the following reasons, viz:

1st. The verdict of the jury is contrary to the law of the case.

2d. Said verdict is not in accordance with or sustained by the evidence in the cause.

3d. The court erred in refusing to give to the jury the written instructions offered by the defendant, and now on file in this court numbered 5, 6, & 7, respectively.

12 4th. The court erred in giving to the jury the instructions which were given other than those tendered by this defendant, and especially in instructing the jury that "if Simpson, the chief train dispatcher at Fort Wayne, saw proper to direct Waldo, the defendant's day operator at Wabash, to employ McHenry as night operator at that place, and in pursuance of this instruction he was employed by Waldo, his, Waldo's, knowledge and information of McHenry was the knowledge and information of the company."

5th. The court also specially erred in instructing the jury that "if the jury believe that by agreement between McHenry's father and Waldo that the latter was to receive ten dollars per month of the son's wages for giving attention to the son in the management of the office, this is a fact tending to show that Waldo knew that the son was not capable of discharging the duties of night operator."

6th. That the verdict is excessive.

C. B. STUART &
BAKER, HORD & HENDRICKS,
Att'ys for D'f't.

And afterwards, to wit, at the November term of said court, on the 3d day of April, 1880, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

13 Come now the parties by their respective attorneys, and the court having heard the argument of counsel, and being sufficiently advised in the premises, does now overrule the motion for a new trial herein.

And thereupon the attorneys move the court for a judgment upon the verdict heretofore rendered herein.

It is thereupon considered by the court that the said plaintiff do have and recover of the said defendant, The Wabash Railway Company, the said sum of fifteen thousand ($15,000.00) dollars, together with his costs and charges herein expended, taxed at $; and it is further considered by the court that the defendant do have thirty days' time from and after this date in which to file a bill of exceptions herein.

And afterwards, to wit, at the November term of said court, on the 30th day of April, 1880, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by C. B. Stuart and Baker, Hord and Hendricks, its attorneys, and files its bill of exceptions herein in the words following, to wit:

Be it remembered that on the trial of the above-entitled cause, in the court and at the term aforesaid, the matter of fact hereafter stated and set forth in the first, second, third, fourth, fifth, sixth, seventh, & eighth paragraphs of this bill of exceptions were proved to and before the

14 jury and were not controverted on the trial by the parties to the cause, or either of them:

1st. That prior to and at the time of the collision hereinafter mentioned, the defendant was the owner of and operating the railroad mentioned in plaintiff's complaint, extending from Toledo, in the State of Ohio, by way

of Fort Wayne, Huntington, and Wabash, in the State of Indiana, to St. Louis, in the State of Missouri.

2nd. That prior to and on the 17th day of August, 1877, the plaintiff was in the service of the defendant on said railroad as a breakman on defendant's freight trains, his average earnings as such being about 40 to 45 dollars p'r month; and prior to and on said day William P. McHenry was in the service of said defendant as telegraph operator at the defendant's station on said road at Wabash, in the State of Indiana, his daily period of duty as such commencing at 7 o'clock in the evening of each day, and terminating at 7 o'clock in the morning of the next succeeding day, and that plaintiff, when he entered defendant's service, knew that defendant's trains were controlled and operated on said road by telegraph, and that the orders were given by the defendant's train despatcher; that H. T. Simpson was defendant's chief train despatcher at Fort Wayne, and that C. B. Cumpston was one of his assistant train despatchers.

3rd. That section one (1) of defendant's freight train No. thirteen (13), going west from Ft. Wayne, Indiana, on said railroad, collided with section six (6) of defendant's freight train No. sixteen (16), going east,
15 on said road, at a point near Belden Bridge, between the stations on said road designated as Antioch and Lagro stations respectively; that this collision took place before daylight on the morning of August 17th, 1877, and the plaintiff at the time of said collision was at his post of duty as breakman on said section No. 1, of said train No. 13, and by the collision lost a leg, and was otherwise injured. Said McHenry was, at the time of and before the collision, on duty at said station at Wabash, as defendant's night telegraph operator, and was asleep at his post of duty when said section No. 5 of said train No. 16 passed said station going east on said road. Just as section 6 of said train No. 16 passed said station McHenry awoke and was asked by telegraph by defendant's train despatcher at Fort Wayne aforesaid for said section 5 of said train 16, and McHenry not knowing that this section had passed the station while he was asleep, and mistaking section 6 for section 5, replied over the wire that section 5 had just passed the station. He was then asked over the wire by said train despatcher at Fort Wayne for section 6, and replied over the wire that section 6 had not passed said station, when in truth it had passed as before stated. The defendant's train despatcher at Fort Wayne, who was ordering the moving of trains by telegraph between Fort Wayne and Wabash, relying on the correctness of the last-mentioned dispatch or reply received from McHenry, and supposing that said section 6 was still west of said station at Wabash, ordered by telegraph said section
16 1 of train 13, then at Huntington, to run west to Lagro, a station on said railroad east of Wabash, and between Antioch and Wabash, and thereby said section No. 1 of train 13 and said section 6 of train 16 were brought into collision as aforesaid, with the result to the plaintiff above mentioned.

4th. It was also proved that years prior to and at the time of said collision K. H. Wade was the defendant's division superintendent for that division of said railroad, which included Fort Wayne and Wabash aforesaid and all points between those stations, and that Simpson then was, and for many months previous had been, defendant's train despatcher at Fort Wayne, Indiana; that the headquarters of the division superintendent

were, and had long been, at Fort Wayne; and that said Wade and Simpson were competent and qualified for their respective positions, and skilled in the performance of the duties thereof, and trustworthy; and that said Simpson, as such train despatcher, was charged with the duty of appointing and removing the defendant's night telegraph operators at said station at Wabash, as well as at other stations on that part of the road for which he was such train despatcher, but that this power of appointment and removal was subject to the approval or disapproval of said Wade as division superintendent.

5th. That at the time of said collision, and for seven years prior thereto, J. D. Waldo was in the joint employment of the Western Union Telegraph Company and the defendant as day telegraph operator for
17 both companies at said station at Wabash, both companies occupying the same office or room, and using the same telegraphic instruments and wires at said station, and period of duty of Waldo being from 7 o'clock in the morning until 7 o'clock in the evening of each day. That said Waldo was a competent, experienced, and well qualified telegraph operator, and fully acquainted with the qualifications and requirements necessary to fill the position of telegraphic night operator for the defendant at said station; and that defendant's general superintendent, Col. Andrews, and said division superintendent, Wade, and train despatcher, Simpson, of defendant, knew that said Waldo was thus competent, experienced, qualified, and informed, and had full confidence in his ability and trustworthiness.

6th. That in June, 1876, said McHenry entered the said office of said Western Union Telegraph Company and said defendant at Wabash station aforesaid, as messenger boy and to learn telegraphy under the instructions of the said Waldo. That the only compensation the said McHenry was to receive or did receive for his services as such messenger boy was ten dollars per month, which was paid by said telegraph company, his chief business being to carry and deliver messages for said telegraph company. That the daily period of duty of said McHenry, as such messenger boy, was from seven o'clock in the morning to 7 o'clock in the evening of each day. That by an arrangement made between said Mc-
18 Henry and his father and said Waldo was to instruct said McHenry in telegraphy, and was to receive therefor the $10 per month paid by said telegraph company to said McHenry for his services.

7th. That said McHenry was seventeen years of age on the twentieth day of June, 1877, and commenced acting as the defendant's telegraph operator at Wabash as aforesaid on the evening of the 7th day of August, 1877. That he had previously served in the same office or at the same station as messenger boy with Waldo as aforesaid for about one year, and that said McHenry had for a month or more, immediately before his entering upon his duties as operator at said station as aforesaid, been at work in the country, harvesting. That said McHenry after he was appointed night operator on Aug. 7th, 1877, had successfully and acceptably acted as defendant's telegraph night operator at said Wabash station for nine consecutive nights previous to that on which he went to sleep, to wit, Aug. 17, 1877.

That the only knowledge and experience that McHenry had before he took charge of said station in telegraphing, was such as he acquired under

Waldo in said office as aforesaid, and that he had never been employed or had charge of an office as operator prior to the time when he commenced duty as aforesaid as defendant's night operator at said station. While McHenry was acting as messenger boy at said station, T. A. Clough or T. A. Wade was night operator, and McHenry had on divers occa-
19 sions remained in the office with Thomas A. Clough, otherwise known as Thomas A. Wade, until a late hour in the night, and on two occasions he had remained all night with said Clough. McHenry's habits and morals were good, and he was bright, intelligent, and industrious. The year previous to his employment as messenger boy, he stood first at school in a class of nineteen.

8th. In June, 1877, said McHenry was recommended by said Waldo to said train despatcher of the defendant at Fort Wayne, Simpson, as competent and qualified to fill the position of telegraph operator at a way station such as Wabash, on defendant's road, and his appointment to such a position in case a vacancy should occur was at the same time recommended by said Waldo to said Simpson. In addition to matters so proven as aforesaid, there was evidence given to the jury tending to prove that it was and is the custom of this and other railroad companies to educate their telegraph operators while serving as messenger boys, and to appoint them to positions as night operators when they had acquired like knowledge and experience to that acquired by McHenry when he was placed on night duty as defendant's telegraph operator at Wabash, and that this system had produced satisfactory results, and that a large per cent. of the messenger boys so educated and placed on duty as night operators were not more than seventeen years of age when they were so placed on duty by
20 said companies, and that boys of this age succeeded as well in performing their duties as night operators, including the duty of keeping awake, as older persons of like qualifications. The pay of McHenry as night operator was to be fifty dollars per month, the same as were for similar service as night operators at the stations on defendant's road.

As to the manner of the appointment of said McHenry to the position of night telegraph operator at Wabash as aforesaid, said superintendent, Wade, Simpson, Waldo, McHenry, and the father of said McHenry, John A. McHenry, all testified as follows to the jury on the trial:

K. H. Wade, defendant's division superintendent of that portion of the road where this collision occurred, testified on said trial that the train despatcher, Simpson, has charge of telegraph operators on that division of defendant's road, and both employs and discharges them subject to said Wade's approval. He, Simpson, appointed W. P. McHenry; Waldo had no power to employ operators.

H. T. Simpson, def't's train-despatcher, testified on said trial that he brought Clough (alias Wade), the night operator for a year previous at Wabash, to Ft. Wayne, and to fill that vacancy he made use of McHenry, and instructed Waldo over the wires to hire McHenry as night operator for the Wabash company, McHenry not being in Simpson's reach. There was also evidence given to the jury tending to prove that said J. D. Waldo did instruct said Wm. P. McHenry not only while conduct-
21 ing the business of the office, but gave him about an hour's special instruction after business hours each day in telegraphy in a different room on a different instrument from that used in conducting the

business of telegraphing for the defendant. There was also evidence given to the jury tending to prove that said Simpson, as defendant's train despatcher, upon said Waldo's recommendation, and without Simpson knowing him, or even having previously seen him, and upon what Simpson knew of said McHenry's skill from having occasionally noticed at Ft. Wayne his, Henry's, manipulation of the wires at Wabash, McHenry was by direction of Simpson put in the position of night operator for defendant by Waldo at said station on the evening of August 7th, 1877.

J. D. Waldo upon said trial testified to the jury that on said 7th day of August, 1877, he received at Wabash, from Ft. Wayne a telegraphic direction from said Simpson directing him to put said McHenry in charge of the telegraph office of defendant at Wabash as night operator until further orders, and this should be done at once, as the then occupant of the place was to be transferred to Ft. Wayne as assistant train dispatcher; and said Waldo also testified that, in pursuance of this telegraphic dispatch from Simpson, he notified said McHenry of his appointment on the 7th of August, 1877, and that said William P. McHenry went on duty in said office as defendant's night telegraph operator at that station on that night.

22 Said William P. McHenry and his father, John A. McHenry, both testified that the arrangement to put said William P. on duty at said station, as defendant's night operator, was made with the said Waldo on said 7th day of August, 1877, and that neither of them had any communication with Simpson or any other person, except Waldo, on the subject. They also testified that William P. McHenry, in pursuance of the arrangement made by Waldo, went on duty at said office as defendant's night operator on the evening of the day last named. The above is all the evidence given to the jury on said trial as to the manner in which and the person by whom said William P. McHenry was employed to fill said position of night telegraph operator at said station; and there was no evidence given to the jury tending to prove that Waldo had any authority independently of said dispatch from said Simpson, to employ said William P. McHenry to said position, or that he had any authority to remove him therefrom after he was so employed, and there was direct proof that Waldo had no power to employ or discharge night or day operators.

Said John A. McHenry also testified to said jury on said trial, that on said 7th day of August, 1877, after his son, William P., had been notified by Waldo of his appointment, but before he had entered upon the duties of the position, said father met said Waldo in the street in Wabash, and told him that he desired him still to give his son attention in his

23 new position, and that if he would do so, he should have ten dollars per month out of the wages of the said Wm. P. McHenry as night operator at said station, to have special care over the boy so that he might not fail; that Waldo without speaking assented to this most distinctly by an inclination or nod of the head. Said Waldo testified to the jury that he did meet the elder McHenry in the street at the time stated by him, and that said McHenry made to Waldo such a proposition as that testified to by said McHenry, but said Waldo further testified to the jury that he did not in any way assent to said proposition, but instead of such assent, told said McHenry that the defendant would not allow any such arrangement, and that there was no necessity for it, as his son, William P., was en-

tirely competent to perform the duties of the position, and could get along without help from any one.

And the foregoing contains all the evidence that was given to said jury as to the said proposition of the said John A. McHenry to said Waldo and as to the acceptance or rejection thereof by said Waldo, and there was no evidence given to said jury at said trial tending to prove that said Simpson, or any other officer or agent of the defendant, was or were at any time prior to said collision informed of what had transpired at said interview between said John A. McHenry and said Waldo, or even that any interview between them had taken place.

24 On the subject of said Wm. McHenry's competency and qualifications for the performance of the duties of night operator at said station the following evidence of persons acquainted with said McHenry was given to the jury, to wit:

Said William P. McHenry himself testified that he was not competent to transmit press reports, because of their length and the rapidity that was required in their transmission. Waldo was more skilful in the art of telegraphy than I was, but I was sufficiently skilled in the art to send and receive such despatches as were called for by the company's business at said station.

The father of said William P. McHenry testified to said jury that he believed said William P. to be competent for the performance of the duties of said position; that he felt confident that Waldo knew whether said William P. was competent to perform said duties or not; that Waldo had assured him that his son was thus competent, and that he had full confidence in this assurance and Waldo's judgment.

K. H. Wade, the defendant's division superintendent, testified that he had served the defendant as such division superintendent for more than five years, during which time 4 or 5 out of 75 were 17 years of age or under, of the night operators on his division of defendant's road, and that this was the first collision that had occurred on said division of said

25 road during his service as aforesaid as superintendent of said division by reason of a like neglect of an operator.

T. A. Clough (alias T. A. Wade) was McHenry's predecessor as night operator at Wabash, and had been schoolmate with McHenry; was night operator at Wabash for the year during which McHenry was messenger boy, and when Clough went to Ft. Wayne McHenry was given Clough's place. When Clough was on duty at Ft. Wayne McHenry was on duty at Wabash. Clough had known McHenry for several years as schoolmate, office-mate, and generally. Clough says McHenry was a good operator, and amply able to satisfactorily fill the position of night operator, and did fill it up to night of accident as well as any one could have done it. When Clough was promoted to Ft. Wayne office he was one year younger than *than* McHenry; never knew McHenry to make a mistake in his work.

J. D. Waldo testified on said trial that he had known McHenry several years; knew him to be bright, moral, intelligent, and industrious. He learned the art of telegraphing very rapidly, and, in June, 1877, was amply fitted in every way for a position such as the one of night operator at Wabash, and I had so recommended him to Train Dispatcher Simpson, both by letter and over the wire, on several occasions about that time.

C. B. Cumston was defendant's night train dispatcher at Ft. Wayne, and was on duty there while McHenry was on duty at Wabash, and
26 from the 7th to the 17th of August, 1877, and testified on said trial before the jury that he had communication with McHenry over the wire every night during that time, & that McHenry took orders and transacted the business as well as anybody on the line, and, in his opinion, was a competent man for the place.

And upon the trial of said cause before the jury upon the question as to whether there was a custom on railroads, generally, in regard to promoting messenger telegraph boys to positions as night operators, the ages at which such promotions are made, and the results of such custom of promotion, as shown by a long experience, the defendant introduced the following testimony, either oral or in deposition:

Robert Andrews testified on said trial that he was 44 years of age, and was general superintendent of the Wabash Railway Company, and had been for several years past; that he had been engaged in railroad business 25 years, & on several different roads; that he has personally known J. D. Waldo for the past eleven years, during most of which time Waldo was directly under him, and, by reason of his long and faithful service to the company, as also by reason of his ability, had gained the confidence of the officers of the company. It is the general custom on railroads to take bright, intelligent boys of good habits in the telegraph offices as messenger boys, and when they have become qualified in the art & receive the
27 recommendation of the operator with whom they have learned they are promoted to positions as day & night operators. And, as a general rule, messenger boys so promoted have shown themselves worthy of the promotion; and they make the safer and better operators for railway service, as they know the company's way of doing business, having learned right at the start. This custom prevails on Lake Shore & Michigan Southern, Penn. Central, New York Central, Illinois Central, Chicago and Alton, and 25 or 30 other roads which could be named. When railroads secure young boys of intelligence & morality they have the class of operators the least likely to go to sleep. That is the best can be done. There would be no difference in the chances of an operator of 17 and one of 21 years of age going to sleep on duty, other things being equal. The best operators on the Wabash road have been from 15 to 18 years of age.

K. H. Wade testified on said trial that he was 37 years of age & superintendent of the Eastern Division of Wabash Railway, extending from Toledo, Ohio, to Danville, Ill's, & including the county & town of Wabash, Ind., and had been such sup't 5 years. That he commenced the railroad business as a messenger boy in a telegraph office at 14 years of age & learned telegraphing in about 6 months, and then had an office as operator, day & night work; from messenger boy he has been promoted through all the grades to his present position, including train dispatcher. During all this time he was intimately acquainted with the tele-
28 graph business on Wabash and other roads, and has had the duty of employing and discharging telegraph operators for several years. Railroads get their best operators by taking messenger boys who have been raised under the instruction of our operators and promoting them as they deserve. The class of telegraph operators highest in rank and upon whom devolves the duty of moving trains and who give all the orders are

called train dispatchers. On Eastern Division of Wabash Railway these train despatchers are stationed at Ft. Wayne, Ind. All the train despatchers in Fort Wayne office started as messenger boys, and have been promoted up to present position. H. T. Simpson was chief train despatcher. C. B. Cumston was the night despatcher in Aug., 1877. The operators at way stations (such as Wabash) have no responsibility in the giving of orders for the moving of trains, they simply answer questions & report passing trains. Day business at these way stations is nearly double the night business, and hence night work is considered easiest. Twenty years' experience has shown that a young man is less apt to sleep while on duty than an older one; that the young man feels that everything is at stake & devotes all his time & energy to his work, & hence the best service is from that class of operators. He had known J. D. Waldo ten years, during most of which time Waldo was directly under his supervision & direction, & he was very reliable in every way & a competent telegraph operator, & if he had educated a young man to the tele-
29 graph business would know better than any one else could know as to his capacity & qualifications. There is no way of ascertaining whether an operator will sleep while on duty; good & steady habits are the best indications that one will not sleep. The collision of Aug. 17, 1877, was the only one resulting from a similar cause during his five years as superintendent. On that portion of the road traversed by McDaniels, viz, between Ft. Wayne & Lafayette, there were 4 or 5 operators as young or younger than McHenry, & this while McDaniels was running on the road.

H. T. Simpson testified on the trial of said cause that he was 36 years of age, & is now engaged in furniture business. In 1877 he was chief train dispatcher on Wabash Railway, and had been from 1873; that he resigned his position in 1878, & went into business. Had been engaged in railroading for 16 years. Commenced as messenger boy in telegraph office, and had charge of an office when in his 17th year. In 1876 & 1877 knew that McHenry was a student under Waldo, at Wabash station, and in June, 1877, or earlier, Waldo had recommended McHenry as a competent person as a night operator when a vacancy should occur on the road. He had worked some with McHenry over the wires prior to his appointment as night operator, and was satisfied he could manipulate the instruments all right. It is customary on railroads to promote messenger boys to night operators, and from the result considered them the best class of operators. Think night service is best for beginners, as work is
30 easier and light. There would be no choice in favor of older applicant, other things being equal, between two applicants of 17 and 20 years of age. Between Aug. 7 and 17, 1877, he made frequent inquiries of train dispatcher as to how McHenry was doing, and they always reported the he was doing all right.

C. B. Cumpston testified on the trial of said cause that he was train dispatcher at Ft. Wayne, on the Wabash Railway, in 1877. That he had been telegraphing for railroads ten years and over; that he commenced as messenger boy in telegraph office of Western Union Telegraph Co., when 15 years of age. Then was operator for Western Union, and at 18 had a railroad office, and have been promoted to present position.

J. D. Waldo testified on the trial of said cause that he was manager

Western Union Telegraph Co.'s office, and operator Wabash Railway, at Wabash, Indiana; 31 years of age, and has been 14 years a telegraph operator; eleven years on Wabash Railway. Commenced telegraph business as messenger boy, and had office at 17. Had known W. P. McHenry for some time prior to Aug., 1877, and between June, 1876, and August, 1877, had known him very intimately, passing most of every day in his company, and knew him to be honest, of good habits, intelligent & ambitious. He had time and again seen McHenry at work, and noticed that he did his work
31 well. He had written to H. T. Simpson, train dispatcher at Fort Wayne, recommending W. P. McHenry for a position on the road as night operator as soon as a vacancy should occur, and had called Simpson's attention to McHenry frequently in conversations over the wire. This was several months prior to Aug., 1877. Knowing McHenry as he did, he thought he would do well, and had no idea that he would sleep while on duty. There were three or four night operators on Wabash R'y prior to Aug., 1877, between Ft. Wayne & Lafayette who were as young or younger than McHenry. McHenry's predecessor, as well as his successor in the Wabash office, were under 17. Simpson knowing that McHenry was ready for a place and waiting for it, & that he lived at Wabash, informed him, Waldo, over the wire that he, Simpson, was going to take the Wabash night operator, T. A. Clough, alias Wade, to Fort Wayne office, and that McHenry should be put to work nights at Wabash until further orders. Simpson had been notified that McHenry could be had on short notice. McHenry learned telegraphy in 7 or 8 months. That he notified W. P. McHenry on Aug. 7 that Simpson had appointed him night operator at Wabash until further orders.

James H. Stewart testified on said trial that he was 51 years of age, and general manager Cincinnati, Lafayette & Chicago R'y, and had been in railroad business 28 years on several different roads and in various positions. General custom on railroads to take bright young men in the telegraph offices as message boys and teach them to telegraph
32 and make operators of them, from time to time, as they merit. Would not hesitate to appoint a young man 15 to 18 years of age of good habits as night operator, if he had been 10 months a student in an office under the regular operator, who was himself competent, and who recommended him.

E. H. Waldron testified on said trial that he was 35 years of age, and general manager of Lafayette, Bloomington & Mississippi R'y, and general superintendent of Lafayette, Muncie & Bloomington R'y, and had been 19 years in railroad business, & held nearly all position", & on half a dozen different roads. It is always customary to keep from one to half a dozen boys at several telegraph stations on the line learning the telegraph business for the purpose of filling vacancies in the telegraph offices for day and night service. These young men, when recommended by the operator who taught them, and endorsed by the train despatcher, are appointed from 15 to 16 years of age and upwards; as to sleeping, the recommendation of their associates is the best we have to judge by.

G. G. Hadley testified in said cause that he was assistant superintendent of the C., L. & C. R. R; in railroad business 12 years as operator, train dispatcher, and assistant superintendent. It is customary on railroads to take students, and when they are sufficiently skilled to receive en-

33 dorsement of the regular operator, they are put to work. That he commenced the business at 13 as messenger boy, and 6 months afterwards was operator. Average boy learns in about 6 months. Any operator, old or young, would, if he be qualified or not, be just as liable to go to sleep. A young man 15 to 18, who has been a student 10 months and receives the recommendation of his teacher, is a proper person to be appointed night operator.

Joseph Hill testified on the trial of said cause that he was 50 years of age, and superintendent of the Pan Handle Railway, and for 9 years had been; had been in the railway business over 25 years, on many roads and in many positions. When we have vacancies for night operators, and we know of persons who have learned at our offices to be competent and qualified in every particular, we usually give them the place. Their competency is ascertained from regular operators and train dispatchers. No way of finding out whether operator will sleep. Have known good operators from 15 years of age upwards. Have had operators over twenty years of age and of several years' experience sleep while on duty. A young man about sixteen years of age and of good character and habits who had been ten months a student in a telegraph office, and the regular operator endorsed the student as competent as night operator, and this is approved by the train dispatcher, would be a proper person to appoint to the position of a night operator.

34 T. A. Clough (alias T. A. Wade) testified at the trial of said cause that he was 19 years of age, and lived at Rochester, N. Y., and was in office of train dispatcher of New York Central & Hudson River R. R. He used to work as operator on Wabash Railway at Wabash and Ft. Wayne, Indiana, and Napoleon, Ohio. Been telegraphing about four years. Did first work as operator when I was between 15 & 16 years of age. Learned telegraphing under J. D. Waldo, as messenger boy, at Wabash, Ind.; learned in four months. He was night operator at Wabash prior to Aug. 7, 1877, & had been for a year, and was 16 years of age; and went to dispatcher's office, Ft. Wayne, on Aug. 7, where he worked nights; he was at work at Ft. Wayne during same hours McHenry was at work at Wabash, and frequently communicated with him over the wire. Have known W. P. McHenry four or five years as school-mate, office-mate, & generally. During his service as night operator at Wabash, McHenry was messenger boy, and was learning telegraphing; & he was very apt at learning; was ambitious & industrious. McHenry's habits were good; he was smart above the average. McHenry was competent to fill the position of night operator at Wabash; never knew McHenry to make a mistake. The Ft. Wayne train dispatchers were satisfied with the way McHenry was doing, & so stated. Know Waldo, & know him to be a good operator, faithful and a good teacher. It is generally customary to promote students raised in telegraph offices as soon as they are com-

35 petent, and this done without any special reference to their ages; but they must be of good habits and of good natural abilities. As to sleeping on duty an older man is just as apt to sleep as a younger man.

James F. Wallick testified on the trial of said cause that he was 50 years of age, and superintendent of the Western Union Co. for Indiana, and has been for over 15 years. Been telegraphing 27 years. Western Union Co. have a great many boys in their service who are under 18 years of age; they

are made operators at no particular age. If a boy of 15 or 17 years of age, of good habits, well recommended by the operator who had been teaching him for 12 months should apply for a place, he would be a proper person to appoint. His age would not be against him if he were otherwise qualified. Just as good a person for a responsible place as one of 25 or 30 years of age.

And on cross-examination Wallick testified that he would not employ a boy without knowing something about his capacity to sit up and keep awake, and the only way that he could obtain that information would be by personal knowledge or recommendation.

J. W. Sherwood testified on the trial of said cause that he was 30 years of age, and master of transportation of Indianapolis, Cincinnati & Lafayette R'y, and superintendent of Cincinnati, Lafayette & Chicago R'y.

36 Been in railroad since 1864, and commenced as messenger boy in telegraph office at 14, and had charge of an office in 6 months, when he was between 14 & 15 years of age. There are a number of boys on I., C. & L. R'y & C., L. & C. R'y of 17 & younger, employed as operators. ⅓ of operators are between 15 & 20, and they serve as night & day operators with very satisfactory results. No difference in result by reason of age.

Isaac D. Barton testified on the trial of said cause that he was 48 years of age, and superintendent of Indiana, Bloomington & Western R'y. Been engaged in railroading 29 years on various roads and in various positions, including train dispatcher. Railroads promote messenger boys to operators, commencing at 15 & 18 years of age; they are usually regarded as the best operators. Have had operators younger than 18, & they do well. Age does not make much difference—it is what a young man is worth, what a man knows, and what his ability is. An operator of 32 years of age and of several years' experience went to sleep last week on duty on I., B. & W. R'y. There is no way of testing a man to find out whether he will sleep while on duty. He might keep awake to-night & go to sleep to-morrow night. The man of 32 years of age, who went to sleep, was a good man and had been a despatcher for a long time. A young man of 16 or

37 17, of good morals, truthful, & intelligent, who had been a student in a telegraph office on the road for 12 or 14 months, and who had been taught by the regular operator, & the regular operator by 9 years' faithful service had shown himself faithful & and competent, & he should recommend the student for a position as night operator, such an appointment would be proper on the recommendation, even tho' the dispatcher had not seen the applicant. It all depends on the boy. If he was a good, bright boy, there would be no difficulty in appointing him.

And on cross-examination the witness Barton testified that an operator would have to get accustomed to stay awake at night before he would be skilled.

And after the jury had heard the evidence and arguments of counsel in the cause, the court, of its own motion, instructed the jury as follows:

1st. Section 1 of freight train No. 13, going west, collided with section 6 of freight train No. 16, going east, near Belden Bridge, and between Antioch and Sagro, before daylight on the morning of August 17, 1877. At the time of the collision, the plaintiff was at his post of duty as brakeman on section 1 of train No. 13, and lost a leg and was otherwise injured.

McHenry, the telegraph operator at Wabash, was asleep at his post of duty when section 5 of train 16 passed that station going east. Just as section 6 of the train passed the station, McHenry awoke and was asked from Ft. Wayne for section 5, and not knowing that this section had passed while he was asleep, and mistaking section 6 for section 5, he replied that section 5 had passed. He was then asked from Ft. Wayne
38 for section 6, and *and* replied that it had not passed. The train dispatcher at Ft. Wayne, who was ordering the moving of the trains, relying on the correctness of McHenry's dispatch, and supposing that section 6 was still west of Wabash, ordered section 1 of train 13, then at Huntington, to run to Sagro, a station between Antioch and Wabash, and these sections were thus brought into collision. That the collision occurred in this way there is no dispute.

2nd. The plaintiff has sued for compensation in damages for his personal injuries and sufferings, and the accident which caused these injuries and sufferings having resulted from the negligence of McHenry, who was a fellow-servant with the plaintiff in the employment of the defendant, not, however, in the same special department, the burden is on the plaintiff of showing that the defendant did not exercise proper diligence in the selection and employment of McHenry.

3d. It is a rule of law that the master is not liable to one servant for the negligence of a fellow servant. The servant is presumed to know the ordinary perils incident to his employment, and to have his wages adjusted with reference to them. The servant assumes the usual risks of his position, among which is the liability of fellow servants, though capable and of good habits, to be sometimes negligent.

4th. The position of night operator at Wabash was one of great responsibility. The lives of passengers and employés on trains depended
39 upon his skill and fidelity, and the defendant was bound to exercise proper and great care to get a person in all respects fit for the place.

5th. While the defendant was not required to guarantee to its servants the skill and faithfulness of their co-servants, it was required to use all proper diligence in the selection and employment of a night operator at Wabash, and the defendant was bound to discharge McHenry after his employment, if it learned or had reason to believe he was incompetent or negligent.

6. The plaintiff had a right to suppose that the defendant would use proper diligence in the selection of its telegraph operators and all other employees whose incapacity or negligence might expose him to danger, in addition to those which were naturally incident to his employment. What will amount to proper diligence on the part of the master in the selection of a servant for a particular duty will in part depend on the character and responsibility of that duty. The same degree of diligence which is required in the employment of a locomotive engineer would not be required in the employment of a fireman.

7th. Sound sense and public policy require that railroad companies should not be exempt from liability to their employees for injuries resulting from the incompetency or negligence of co-employees, when, by the exercise of proper diligence, such injuries might be avoided.

8th. As already stated, the presumption is that the defendant exer-

40 cised proper diligence in the employment of McHenry, and the burden of showing the contrary is upon the plaintiff. But if from any cause McHenry was not a fit person to be entrusted with the responsible duties of night operator, and the defendant knew that fact, or by reasonable diligence might have known it, it is liable, for it is admitted that the plaintiff's injuries were the direct result of McHenry's negligence, and there is no proof that the plaintiff contributed to the accident by his own negligence.

9th. Was McHenry capable of filling the position of night operator at Wabash, and was he otherwise a fit person for the place? If he was incompetent or negligent, were the proper officers of the company informed of this, or, by reasonable diligence, might they have known it? The tenth night after McHenry went on duty as night operator he went to sleep at his post of duty with the result already stated. He was seventeen years old but a few weeks before this employment. In June, 1876, he went into the service of the defendant, at Wabash, as a messenger boy, and continued in that service some twelve months, during which time he was instructed by Waldo, the day operator, in the art of telegraphy. For this instruction Waldo exacted and received, as compensation, McHenry's wages, $10 per month. For a month or more before McHenry's employment as night operator he worked in the country, harvesting. The only knowledge that he had of telegraphy was what he acquired under Wal-

41 do, and before taking charge as night operator he had never been employed anywhere or in any capacity as operator. He was not competent, as he told you, to take press reports, but was competent, as he thought and as Waldo and Wade (the latter his predecessor as night operator) thought, to do ordinary business, and to discharge the duty of night operator at Wabash; his habits were good, and he was bright and industrious. Waldo had recommended McHenry to Simpson, the chief train despatcher at Ft. Wayne, as capable and faithful, and without knowing McHenry personally, or even seeing him, and on Waldo's recommendation and what Simpson knew of McHenry's skill from having occasionally noticed at Ft. Wayne his fingering the key at Wabash, Simpson directed Waldo to employ McHenry at $50 a month, or, according to Waldo's testimony, he was directed by Mr. Simpson to put McHenry in charge of the office. McHenry's father told Waldo, before the son entered on the discharge of his duties, that Waldo should have $10 a month of the son's wages if Waldo would continue to give the son attention, to which Waldo assented. This is the father's testimony. Waldo admits that the father made the proposition to him as stated, but says he replied that the son was competent to take charge of the office and run it without assistance. Boys no older than McHenry had successfully discharged the duties of day and night despatcher on this and other roads, and it seems to have been the custom of the company to educate its telegraph

42 operators while serving as messenger boys. Other railroad companies, it seems from the evidence, have pursued the same course with satisfactory results.

10th. Upon all these facts, if you believe them to be true, it is for you to say whether or not McHenry was competent, skilful, and trustworthy in the position assigned to him, and, if not competent, skilful, and trustworthy, whether or not the defendant or its accredited agents, when they

made the employment, knew the fact, or with proper diligence might have known it.

11th. If Simpson, the chief train despatcher at Ft. Wayne, saw proper to direct Waldo, the defendant's day operator at Wabash, to employ McHenry as night operator at that place, and in pursuance of this direction he was employed by Waldo, his (Waldo's) knowledge and information of McHenry was the knowledge and information of the company.

12th. And if you believe that by agreement between McHenry's father and Waldo the latter was to receive ten dollars per month of the son's wages for giving attention to the son, in the management of the office, this is a fact tending to show that Waldo knew the son was not capable of discharging the duties of night operator.

13th. If you find for the plaintiff, you will assess his damages at such sum as will fairly compensate him for the loss of his leg and for physical and mental suffering which he has endured and may reasonably be
43 expected to endure hereafter as the direct and necessary result of his injuries.

And at the time of the giving of the foregoing instructions by the court to the jury, designated and numbered 4th, the said defendant objected and *accepted* to said instruction and to the giving thereof by the court to the jury.

And at the time of the giving of the foregoing instruction by the court to the jury, designated and numbered 5th, the said defendant objected and excepted to said instruction and to the giving thereof by the court to the jury.

And at the time of the giving by the court to the jury of the foregoing instruction, designated and numbered 6th, the said defendant objected and *accepted* to said instruction and to the giving thereof by the court to the jury.

And at the time of the giving of the foregoing instruction by the court to the jury, designated and numbered 7th, the said defendant objected and excepted to said instruction and to the giving thereof by the court to the jury.

And at the time of the giving by the court to the jury of the foregoing instruction, designated and numbered 8th, the said defendant objected and excepted to said instruction and to the giving thereof by the court to the jury.

And at the time of the giving by the court to the jury of the foregoing instruction, designated and numbered 13th, the said defendant ob-
44 jected and excepted to said instruction and to the giving thereof by the court to the jury.

And be it further remembered that at the proper time, and before the court had instructed the jury, the defendant tendered in writing to the court the following instruction, and requested the court to give the same to the jury as one of the instruction' in the cause, which instruction, so tendered, is in the words and figures, to wit:

"To render the carelessness of said McHenry the carelessness of the defendant, or to render the defendant liable for the same, it is incumbent on the plaintiff to prove that said McHenry was appointed to or retained in

his position as telegraph operator with knowledge on the part of the company, or some officer or agent of the company having the power of appointment or removal, that he was incompetent, or that such knowledge might have been obtained by the use of reasonable diligence on the part of the defendant, or of such officer or agent of the defendant."

But the court then and there refused to give to the jury, and did not give to the jury, the said above-recited instruction so tendered, to which refusal by the court to give said instruction to the jury the said defendant at the time objected and excepted.

And at the proper time, and before the court had instructed the
45 jury in said cause, the said defendant also tendered to the court in writing the following instructions, and requested the court to give the same to the jury as one of the instructions in the cause, which last mentioned instruction, so tendered, was in these words, to wit:

"The defendant was only bound to exercise ordinary care to ascertain the competency and qualifications of McHenry for the duties of the place to which he was appointed, and the presumption of law is that the defendant did its duty in this respect. It therefore devolves upon the plaintiff to prove that the defendant did not exercise ordinary care to ascertain the competency and qualifications of McHenry prior to his appointment, or that defendant retained him in the position after obtaining knowledge or information of his disqualification or incompetency to perform the duties of the place."

But the court then and there refused to give to the jury the said above-recited instruction so tendered to the court by the defendant, to which refusal of the court to give said instruction to the jury the said defendant at the time objected and excepted.

And be it further remembered that at the proper time and before the court had instructed the jury in said cause, the defendant tendered in writing to the court the following instruction and requested the court to give the same to the jury as one of the instructions in the cause; which
46 last-mentioned instruction so tendered was and is in these words, to wit:

"Although McHenry may have been and was guilty of negligence, and that negligence may have caused and did cause the collision which resulted in the injury to the plaintiff complained of, still the plaintiff cannot recover in this action unless it appears from the evidence that the defendant was guilty of negligence either in the appointment of said McHenry or in retaining him in his position; and to establish such negligence on the part of the defendant, not only the incompetency of said McHenry must be shown, but it must be shown that defendant failed to exercise ordinary care or diligence to ascertain his qualifications and competency prior to his appointment, or failed to remove him after his incompetency had come to the notice of the defendant or to some agent or officer of defendant having power to remove said McHenry."

But the court then and there refused to give and did not give said last-mentioned instruction to the jury as the same was so tendered by the defendant, but the court modified and altered said instruction before giving the same to the jury by striking from said instruction as thus tendered

the word "ordinary" in the only place where it occurred, and inserting in lieu thereof the word "proper;" to which refusal of the court to give
47 said last-mentioned instruction to the jury in the form in which it was so tendered, and to said action of the court in striking from said instruction the word "ordinary" and substituting for said word the word "proper," the said defendant at the time objected and excepted, which said instruction as modified by the court and given by the court to the jury was and is in these words, to wit:

"Although McHenry may have been and was guilty of negligence, and that negligence may have caused and did cause the collision which resulted in the injury to the plaintiff complained of, still the plaintiff cannot recover in this action unless it appears from the evidence that the defendant was guilty of negligence either in the appointment of said McHenry or in retaining him in his position; and to establish such negligence on the part of the defendant, not only the incompetency of said McHenry must be shown, but it must be shown that the defendant failed to exercise proper care or diligence to ascertain his qualifications and competency prior to his appointment, or failed to remove him after his incompetency had come to the notice of defendant or to some agent or officer of defendant having power to remove said McHenry."

And be it further remembered that the jury aforesaid having returned the verdict for the plaintiff set out in the record, the defendant im-
48 mediately upon the return of said verdict moved the court in writing to set aside the verdict so returned and to grant the defendant a new trial in said cause, which motion in writing was and is in the following words, to wit:

JOHN MCDANIELS
vs.
THE WABASH RAILWAY COMPA'Y. } U. S. circuit court.

The defendant moves the court to set aside the verdict of the jury and grant said defendant a new trial in this cause upon the following grounds and for the following reasons, viz:

1st. The verdict of the jury is contrary to the law of the case.

2d. The said verdict is not in accordance with or sustained by the evidence in the cause.

3rd. The court erred in refusing to give the written instructions offered and now filed in this court, numbered 5, 6, & 7 respectively.

4th. The court erred in giving the instructions to the jury other than those tendered by the defendant, and especially in instructing the jury that "if Simpson, the chief train dispatcher at Ft. Wayne, saw proper to direct Waldo, the defendant's day operator at Wabash, to employ McHenry as night operator at that place, and in pursuance of this instruction he was employed by Waldo, his (Waldo's) knowledge and information of McHenry was the knowledge and information of the company."

49 5th. The court also specially erred in instructing the jury that "if the jury believe that by agreement between McHenry's father and Waldo that the latter was to receive ten dollars per month of the son's wages for giving attention to the son in the management of the office, this

is a fact tending to show that Waldo knew that the son was not capable of discharging the duties of night operator."

6th. That the verdict of the jury is excessive.

C. B. STUART &
BAKER, HORD & HENDRICKS,
Att'ys for Def't.

And thereupon the court overruled the defendant's said motion for a new trial, and rendered the judgment set out in the record, to the overruling of which motion for a new trial the defendant also at the time excepted.

And the court having given the said defendant thirty days from and after the rendition of said judgment within which to prepare and file its bill of exceptions as to all the rulings of the court so excepted to as hereinbefore stated, the said defendant now, and within the thirty days so granted
50 by the court, tenders this its bill of exceptions as to all of the matters and rulings of the court hereinbefore excepted to as hereinbefore stated, and prays that the same may be signed, sealed, and made a part of the record, which is now done this 30th day of April, A. D. 1880.

WALTER Q. GRESHAM, *Judge.* [SEAL.]

51 And afterwards, to wit, at the May term of said court, on the 13th day of May, 1880, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

And now here comes the said Wabash Railway Company, by its attorneys, and exhibits to the court a writ of error in this suit from the Supreme Court of the United States, directed to the judges of this court, returnable to the second Monday in October next, and the said Wabash Railway Company also files and lodges with the clerk of this court for said John McDaniels a copy of said writ of error, in pursuance of the statute of the United States *thereof* in such case made and provided, which writ and copy are in the words and figures following, to wit:

UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the seventh circuit and district of Indiana, greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said circuit court before you, between John McDaniels, plaintiff, and The Wabash Railway Company, defendant, a manifest error hath happened, to the great damage of the said The Wabash Railway Company, defendant, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this
52 behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause

further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this 13th day of May, A. D. 1880.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

And the said The Wabash Railway Company also presents to the court and files a bond, with Solon Humphrey and James Cheney as sureties, in the penal sum of twenty-five thousand dollars, payable to the said John McDaniels, and conditioned that the said The Wabash Railway Company shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, which bond being approved by the court, and a writ of error allowed, a citation is now issued by the district judge of this district holding this court, requiring the said
53 John McDaniels to appear at said Supreme Court of the United States on said second day of October next to show cause why the judgment aforesaid should not be corrected, which bond and security are now here approved by the court, and are in the words and figures following, to wit:

Know all men by these presents that we, The Wabash, St. Louis & Pacific Railway Co. as principal, and Solon Humphreys and James Cheney as sureties, are held and firmly bound unto John McDaniels in the penal sum of twenty-five thousand dollars ($25,000.00), for the payment of which, without relief from valuation or appraisement laws, well and truly to be made and done, we bind ourselves jointly, severally, and firmly by these presents. Sealed and dated this 11th day of May, 1880.

Whereas a judgment was rendered in the circuit court of the United States for the district of Indiana on the 3d day of April, 1880, in favor of John McDaniels against The Wabash Railway Company, in a suit commenced against said last-mentioned company prior to its consolidation with the St. Louis, Kansas City and Northern Railway Co., under the name of The Wabash, St. Louis and Pacific Railway Co., and for which judgment the said last-named company, in consequence of such consolidation, is liable; and whereas the said Wabash, St. Louis and Pacific Railway Company, as the successor of said Wabash Railway Company, and in its name, has prosecuted to said circuit court of the
54 United States for the district of Indiana a writ of error to reverse said judgment:

Now, therefore, the consideration of this obligation is such that if either the said Wabash Railway Company or The Wabash, St. Louis and Pacific Railway Company shall prosecute said writ of error to effect and answer all damages if the said corporations or either of them shall fail to make good the plea of the said Wabash Railway Company, then this obligation shall be void; otherwise the same shall remain in full force and effect.

(Signed) THE WABASH, ST. LOUIS & PACIFIC RAILWAY CO.,
[CORPORATE SEAL.] By JAMES F. HOW, *Secretary.*
SOLON HUMPHREYS.
JAMES CHENEY.

Witness:
JAMES F. HOW.

STATE OF MISSOURI,
City of St. Louis, ss:

Personally appeared before me Solon Humphreys, one of the sureties above named, and acknowledged the execution of the above obligation.

[SEAL.] D. G. JONES,
Notary Public, St. Louis City.

STATE OF MISSOURI,
City of St. Louis, ss:

Personally appeared before me James Cheeney, one of the sureties above named, and acknowledged the execution of the above obligation.

Witness my hand official seal this 11th day of May, A. D. 1880.

[SEAL.] JOSEPH DUKIM,
Notary Public.

Term expires Jan. 31st, 1883.

Approved.

W. Q. GRESHAM, *Judge.*

55 And thereupon there issued out of said court a citation in the above-entitled cause in the words following, to wit:

United States of America, to John McDaniels, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the seventh circuit, and district of Indiana, wherein The Wabash Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 13th day of May, in the year of our Lord one thousand eight hundred and eighty.

W. Q. GRESHAM,
Dist. Judge.

56 And on said 13th day of May, 1880, John McDaniels, the said defendant in error, by his attorneys, Mess. Gordon, Lamb & Shepard, acknowledge service in writing endorsed on said citation in the words following, to wit: As attorneys for the within-named defendant in error, John McDaniel, we hereby acknowledge that the within citation to said John McDaniels was served on us at the city of Indianapolis, in the State of Indiana, on this the 13th day of May, A. D. 1880.

GORDON, LAMB & SHEPARD,
Attorneys for McDaniel.

57 DISTRICT OF INDIANA:

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full,

true, and complete transcript of the record in the cause of John McDaniel vs. The Wabash Railway Company, as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said court this 19th day of July, A. D. 1880.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

DISTRICT OF INDIANA:

I, Walter Q. Gresham, judge of the district court of the United States for said district, do certify that, at the date of the foregoing certificate, Noble C. Butler was, and now is, the clerk of the circuit court of the United States for said district, and that his attestation aforesaid is in due form of law.

Witness my hand this 19th day of July, 1880.

W. Q. GRESHAM, *Judge.*

58 In the Supreme Court of the United States.

THE WABASH RAILWAY COMPANY, PLAINTIFF IN ERROR,
vs.
JOHN MCDANIELS, DEFENDANT IN ERROR.

In error to the circuit court of the United States for the district of Indiana, seventh circuit.

And now comes into the Supreme Court of the United States the said plaintiff in error, the said The Wabash Railway Company, by Wager Swayne, Thomas A. Hendricks, and Conrad Baker, its attorneys, and says that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error in this, to wit: that, by the record aforesaid it appears that the judgment aforesaid was given for the said John McDaniels against the said The Wabash Railway Company, whereas by the law of the land the said judgment ought to have been given for the said The Wabash Railway Company against the said John McDaniels, and there was and is also error in the proceedings and judgment aforesaid in the following particulars, to wit, in the overruling of the said The
59 Wabash Railway Company's motion for a new trial, based on the causes specified in the motion (Record, p.):

1st. In the giving by the court to the jury (of the court's own motion) the instructions set out in the record and therein designated and numbered 4th. (Record, pp. 38, 39.)

2d. In giving by the court to the jury (of its own motion) the instruction set out in the record and therein designated and numbered 5th. (Record, p. 39.)

3d. In giving by the court to the jury (of its own motion) the instruction set out in the record and therein designated and numbered 6. (Record, p. 39.)

4th. In giving by the court to the jury (of its own motion) the instructions set out in the record and therein designated and numbered 7th. (Record, p. 39.)

5th. In giving by the court to the jury (of its own motion) the instructions set out in the record and therein designated and numbered 8th. (Record, pp. 39, 40.)

6th. In giving by the court to the jury (of its own motion) the instructions set out in the record and therein designated and numbered 13th. (Record, pp. 42, 43.)

60 7th. In the refusal by the court to give to the jury the instruction tendered by the defendant below, being the first instruction set out in the record as tendered by said defendant. (Record, p. 44.)

8th. In refusing to give to the jury the other instruction tendered by the defendant below, it being the second instruction set out in the record as having been tendered by said defendant to the court. (Record, p. 45.)

9th. In the refusal of the court to give to the jury the other instruction tendered by the defendant below, it being the third instruction set out in the record as having been tendered by the said defendant to the court. (Record, p. 46.)

10th. In the modification by the court of the said last mentioned instruction in manner and form as stated in the record and in giving said instruction, as thus modified, to the jury. (Record, pp. 46,47.)

11th. In the giving by the court to the jury (of its own motion) the instruction set forth in the plaintiff's motion for a new trial, and designated in that motion as the fourth cause for a new trial. (Record, p. 48.) Said instruction being designated in the record as "11th" of the instructions given by the court of its own motion.

12th. In the giving by the court (of its own motion) to the jury
61 of the instruction set out in said motion for a new trial in the fifth clause thereof (Record, p. 49), it being the same instruction designated as "12th" in the instructions given by the court of its own motion. (Record, p. 42.)

Therefore the said The Wabash Railway Company prays that the judgment aforesaid and other errors in the said record and proceedings may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of said judgment, etc.

WAGER SWAYNE,
THOMAS A. HENDRICKS,
CONRAD BAKER, AND
CHARLES B. STUART,
Attorneys for Pl'ff in Error.

(Indorsement on cover:) No. 286. The Wabash Railway Company, plaintiff in error, vs. John McDaniels. Indiana C. C. U. S. Filed 28th September, 1880.

17-452

Supreme Court of the United States.

No. 286.

THE WABASH RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

JOHN McDANIELS.

ARGUMENT FOR THE PLAINTIFF IN ERROR.

WAGER SWAYNE,
CHARLES B. STUART,
Of Counsel.

JUDD & DETWEILER Printers.

Supreme Court of the United States.

No. 286.

THE WABASH RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

JOHN McDANIELS.

ARGUMENT FOR THE PLAINTIFF IN ERROR.

The defendant in error, plaintiff below, was a brakeman in the employ of the railway company. A night operator of the company stated, in answer to an inquiry by telegraph, that a certain train had not passed. The operator had been dozing, and, in fact, the train had passed a few minutes before. In consequence a collision occurred, and defendant lost a leg. He sued the company, alleging that the night operator was employed without due care, and was incompetent, and that the company had knowledge of the fact. The jury found for the plaintiff, and assessed his damages at fifteen thousand dollars.

Certain instructions, given by the court of its own motion, to the jury were excepted to by the defendant, and certain instructions asked by the defendant were refused. The defendant excepted in each instance to such refusal. One charge asked by the defendant was amended by the court, and then given to the jury. The record fails to show, as to two of the court's instructions, that they were excepted to at the trial.

After verdict a motion was made for a new trial and overruled. All of the instructions given by the court, including those two instructions which are not shown as excepted to at the time when they were given, were assigned as grounds for a new trial. The instructions refused and the one given in an amended form were also presented on this footing. The verdict also was presented as contrary to the law of the case, as not sustained by the evidence, and as excessive in amount.

The motion was overruled, and judgment rendered. The bill of exceptions embraces the pleadings, an agreed statement of the testimony, the several series of instructions, and the motion for new trial. The assignments of error include the two instructions given to the jury which were not excepted to by the defendant at the time when they were given, but were presented in the motion as grounds for a new trial.

It was not denied that the brakeman and the operator were fellow-servants, and the court rightly stated the rule of law to be that—

> The servant is presumed to know the ordinary perils incident to his employment, and to have his wages adjusted with reference to them. The servant assumes the usual risks of his position; among which is the liability of fellow-servants, though capable and of good habits, to be sometimes negligent.

There were two points of difference between the court and the counsel for defendant. The first related to the degree of care which the company was bound to exercise in selecting the night operator, whose nap had made the mischief. Defendant's counsel asked that the court instruct the jury that the company was bound to take *ordinary care* to secure a fit man for the position. The court refused, and charged the jury that the defendant was bound to use "*proper and great* care" in so doing. This distinction was strongly impressed upon the jury. The court repeated the

words *proper* care (already defined as "proper and *great* care") in five different instructions. Defendant's instructions, embracing the words "*ordinary* care," were refused. One of them the court took, and after substituting the words "proper care" for "ordinary care," gave it with this express substitution to the jury. The whole could not but impress upon the jury that proper care required of the company something so much more than *ordinary care* as to be entirely distinct from it, and that *ordinary care* in the selection of employés was insufficient and improper.

The principal instruction on this subject was as follows:

> 4th. The position as night operator at Wabash was one of great responsibility. The lives of passengers and employés on trains depended upon his skill and fidelity, and the defendant was bound to exercise proper and great care to get a person in all respects fit for the place, (Record, p. 17.)

The next issue between the counsel for the company and the court was as to the effect of circumstances charged as constituting notice to the company that the operator was unfit for his position.

The company's attorney, who tried the cause below was absent, ill, when the bill of exceptions was presented. Two pages of it as prepared were not presented to the court. The missing pages showed exceptions to the charge with reference to the facts above adverted to. The record shows no such exceptions. This brief is therefore silent with regard to them. The cause of the omission is presented as an act of justice, and explaining what would otherwise leave a natural and pertinent inquiry unanswered.

I. The court erred in charging the jury that "proper and great care," and not "ordinary care," was the duty owing by a railroad company to its employees, in selecting their fellows.

The first question to be discussed is whether the charge of the court that the company's responsibility to its em-

ployés required "*proper and great care*," as distinguished from "ordinary care," in the selection of their fellows.

The difference between the two is radical. One is matter of opinion, the other matter of fact.

Just what is proper care in a case like the case at bar is not within common knowledge. For the jury to try, therefore, the question of proper care, they need to be instructed in the meaning of the words as here applied. Else, every one of them is made to judge of what he does not understand. Their verdict is moreover no longer their united judgment on a question of fact, which admits but one of two conclusions: it is the conglomerate of their opinions on a question of degrees. Hence it is, that degrees of care are among the best known subjects of judicial exposition. The charge of the court was in so far an abdication.

The question of "ordinary" care is one of general usage. The proper evidence is as to what is general practice, not as to what the practice ought to be. What the servant knows and accepts is the practice as it is when he accepts the risks of his employment. The company does not contract with him, nor he with it, with reference to the opinion of a jury. The law exacts of both master and servant the same degree of care. Each has a right to know for what he is contracting. Each is allowed to have recourse to that which is within the reach of observation and inquiry. The law presumes these on both sides. Their results enter into the contract by implication. The contract cannot be amended afterwards by a retroactive verdict. The railroad superintendents, in the case at bar, were properly examined as to their own practice and the general usage on all railroads. The charge of the court upon this head was rightly a surprise.

This palpable difference that "proper care" is a question of law, while "ordinary care" is a question of fact, is clearly presented in *Stratton* vs. *Central City Horse R. R. Co.*, (95 Ills., 25.)

In another part of this instruction the jury are told plaintiff cannot recover, unless the proof shows that by the exercise of *proper care* he could not have averted the injury. This is not a satisfactory statement of the law. The *law* prescribes the *degree* of care *required* in every class of cases; in other words, what is proper care is determined by the law, and is to be declared by the court. Whether *such* care has in fact been exercised in the conduct of a party in a given case is a question of fact, which may properly be submitted to a jury. The law in this case made it the duty of plaintiff to exercise ordinary care. (95 Ill. R., p. 33.)

The general rule that the degree of care required of master and servant is the same, is stated, and the cases cited, in Thompson on Negligence, vol. 2, page 1009:

It may be stated, as a general proposition, that the master is under no higher duty to provide for the safety of the servant than the servant is to provide for his own safety.

The courts have only held the servant to the use of *ordinary care* to avoid injury, so ruled in—

Owen *vs.* N. Y. C. R. R. Co., 1 Lansing, 108.
Muldowney *vs.* Ill. C. R. R., 39 Iowa, 615.
May, Admr., *vs.* Ill. C. R. R., 40 Iowa, 341.
Lumley *vs.* Caswell, 47 Iowa, 159.
Williams *vs.* Clough, 3 Hurl. & Norm., 258.
Crutchfield *vs.* R. R. C., 78 N. C., 300.
Stone *vs.* Oregon Co., 4 Oregon, 52.
Senior *vs.* Ward, 102 E. C. L., 384.
Ballou, Admr., *vs.* C. & N. W. R. R., Wisconsin Supreme Court, February, 1882.

In Beaulieu *vs.* Portland Co., (48 Maine, 291, 294,) DAVIS, J., says:

If a company exercise *ordinary* care to employ servants of good habits, and competent skill and experience in their various departments, and to furnish them with machinery and apparatus of approved construction and material, their

responsibility extends no further. They do not guarantee to their employés the faithfulness and diligence of their co-laborers in carrying on the business.

In Rohback *vs.* The Pacific R. R. Co., (43 Mo., 187, 192, 1869,) WAGNER, J., says:

In McDermott *vs.* Pacific Railroad Compay, (30 Mo., 115,) the point was sharply presented, and it was held that a servant who is injured by the negligence of his fellow servants can maintain no action against the master for such injury, unless the servant by whose negligence the injury is occasioned is not possessed of ordinary skill and capacity in the business intrusted to him, and the employment of such incompetent servant is attributable to the want of *ordinary care* on the part of the master. This rule of exemption was first established by Ld. Ch. Baron Abinger, in the Court of Exchequer, in Priestly *vs.* Fowler, (3 Mees. and W., 1,) decided in 1837. The English authorities are universal and harmonious in its support. Shortly after the case of Priestly *vs.* Fowler the point was decided in the same way in Murray *vs.* The South Carolina Railway Company, (1 McMullan, 385,) and in 1842 the question came up in the supreme court of Massachusetts, in Farwell *vs.* The Boston and Worcester Railroad Corporation, (4 Met. 49,) and the doctrine was reasserted and enforced by the late Chief Sustice Shaw, in one of the ablest and most powerful opinions ever delivered from the bench. This latter case has ever since been regarded as the leading decision on the subject.

The weight of American authority is overwhelmingly and decisively on the same side.

In Murphy *vs.* St. Louis and Iron Mountain R. R. Co., (71 Mo., 202, 1879,) the plaintiff, who was engineer of a passenger train on the defendant's road, was injured by reason of a collision with a freight train, of which one E. W. Evans was conductor. The petition alleged, among other things, that the said conductor was incompetent; that the collision resulted from his incompetency, and that the defendant was guilty of negligence in employing him. The jury were instructed that the burden of proof was in the plaintiff

to establish the unfitness and incompetency of the conductor, and that the injury complained of resulted from his unfitness and incompetency, but that the burden was on the defendant to establish that it used *ordinary* care and prudence in the selection and appointment of said conductor.

HOUGH, J., says:

The court erred in thus instructing the jury. The mere fact of the incompetency of a servant for the work upon which he was employed is not enough to warrant a jury in finding the master guilty of negligence in employing him. * * * * * It is true that the testimony by which the incompetency of a servant is established may be such as to warrant the inference that the master had notice of his incompetency, or that he omitted to make such inquiries as common prudence would have dictated, and thus failed to exercise *ordinary* care in selecting him; but such inference is one of fact to be drawn by the jury under proper instructions from the court.

In McDermott *vs.* Pacific R. R. Co., (30 Mo., 115,) NAPTON, J., says:

"If the agents, by whose negligence the injury is occasioned, are not possessed of ordinary skill and capacity in the business intrusted to them, it has been held that an action will be against the principal by the injured party, although he may be one of the agents or servants. But in such cases it is well settled by the English decisions that the employment of incompetent agents must be traced to the want of *ordinary care* on the part of the principal.

Tenant *vs.* Webb, 37 Eng. C. L. R., 281.

In Dillon *vs.* Union Pacific R. R. Co., (3 Dillon, 319, 323,) DILLON, J., says:

We admit that the rule is settled, both in Great Britain and America, that the master is bound to use *ordinary care* to employ and retain competent servants, and to furnish and maintain suitable and safe machinery and structures.

In Baulec *vs.* N. Y. & Harlem R. R. Co., (59 N. Y., 356, 359,) ALLEN, J., says:

The duty of a railroad corporation is to exercise *due*, that is *ordinary*, care in the selection and employment of its servants and agents, having respect to their particular duties and responsibilities, and the consequences that may result from the want of competence, skill, or care in the performance of their duties. * * * * *

But a single act of casual neglect does not, per se, tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts, and not by a single act. An engineer might from inattention omit to sound the whistle or ring the bell at a road crossing, but such fact would not tend to prove him a careless and negligent servant of the company. The company is only charged with the duty of employing those who have acquired a good character in respect to the qualifications called for by their particular services, and no one would say that a good character acquired by a long service was destroyed or seriously impaired by a single involuntary and unintentional fault.

Murphy *vs.* Pollock, 15 Irish C. L., 224.

In Lake Shore and Michigan Southern Railway Co. *vs.* McCormick, (74 Ind., 440, 445,) SCOTT, J. says:

The master's obligation is not to supply the servant with absolutely safe machinery, or with any particular kind of machinery; but his obligation is to use *ordinary* and *reasonable* care not to subject the servant to extraordinary or unreasonable danger.

In the case last cited, (Tarrant *vs.* Webb, 37 Eng. L. & E., 281,) JERVIS, C. J., says:

It is enough if the master uses *ordinary* care and caution in the selection.

In Gilman *vs.* R. R., 10 Allen, 233—

It is held, that the master is only held to *ordinary care* in in relation to his servant.

In King *vs.* Boston & W. R. R. Co., 9 Cush., 112, FLETCHER, J.—

Their (R. R. Co's) obligation so far as respects those in their employment, would not extend beyond the use of *ordinary* care and diligence. (115.)

In Thompson on Negligence, Vol. 2, p. 982, §11—*The master's duty to his servant:*—

His duty to them is discharged by the exercise of reasonable or *ordinary* care.

In Miller *vs.* B. & O. R. R. Co., United States Circuit Court, Southern District of Ohio, 3 Central Law Journal, 809, it is held—

The master however is bound to exercise *ordinary* care to employ and retain in his service competent servants.

In P. & C. R. R. *vs.* Sentmeyer, 92 Pa. St., 276, the court uses the words "*ordinary* care" as the proper measure of care on the part of both master and servant.

In Cowles *vs.* R. & D. R. R. Co., 84 N. C. 309—

Held, Master can defeat an action of this kind by showing that *ordinary* care has been used in selecting men and machinery.

In Ballou, Admr., *vs.* C. & N. W. Ry., Supreme Court, Wisconsin, 7 Feb'y, 1882—

Held, The words *ordinary* care are used to define the duty owed by master to servant.

Walker *vs.* Bolling, (22 Ala., 264,) GOLDTHWAITE, J.:

The master is not bound to use more than *ordinary* care towards those who stand in the relation of servants towards him. If he fails in the discharge of his duty in this respect, and the servant thereby sustains an injury, he is responsible; while, on the other hand, if he discharges this duty, the servant is presumed to take all the risks which enter

into the service, including those which he would incur from the negligence of his fellow servants. Upon the principles of these decisions it was ordinary care towards the servant, when the master associated with him in the common business persons of ordinary skill and care, (309.)

In Slater *vs.* Jewett, 85 New York, 61.

Held: When railroad companies have provided rules for the transaction of their business and exercised *ordinary care* in selecting servants they are not liable.

In Manville *vs.* R. R. Co., 11 Ohio St., 417—

Ordinary care is held to be the measure of the master's duty to the servant.

The general rule is finally summed up in Wood on Master and Servant, (page 770, § 393:)

The rule is, that when the master has provided suitable instrumentalities for the particular business—and by instrumentalities is meant all the appliances used in the prosecution of the business, including co-servants, machinery, materials and place—he has discharged his duty to the servant, and is only bound to the exercise of *ordinary care;* that is, such care as a reasonably prudent man would use in his selection of these agencies, and in keeping them in condition; and if, in spite of this care on his part, an injury occurs, he is not responsible therefor.

In either case the question is whether the master is guilty of such negligence in the employment of agents that it can be fairly said he is in fault. Whether he has failed to act with such *ordinary* care and regard for the safety of his employees as a man of ordinary prudence would have exercised under similar circumstances, and if he is not at fault in these respects, there is no rule or law that will hold him liable to his servants for injuries that they may sustain from defects in the instrumentalities of the business, whether they were supplied by third persons, or were manufactured by his own workmen.

Woods' Law of Master and Servant, sec. 411.

It is laid down in Pierce on Railroads, page 374, that—

The master does not warrant to each servant the competency of his fellow servants, and in case of injury to one by the other, the question, in determining the master's liability, is not only whether the wrong-doer was in fact incompetent for the service, but also whether the master failed to exercise *ordinary care* in employing them; and both the default of the servant and such want of *ordinary care* in the master must concur to render him liable for the injury.

And in Tarrant *vs.* Webb, supra, it is held that—

The question to be considered is not whether the servant was competent, but whether the master used *ordinary care* in the selection.

An excellent illustration of the situation of the jury, and of their need of instruction in a case like this, is found in Wood's Master and Servant, § 453, (at page 904.) "As an illustration of the rule, suppose that the directors of a railroad company, having no knowledge of the mechanism or operations of a locomotive, should undertake to select locomotives for the use of the road, and, through their ignorance in these respects, should select those which were unsafe and defective, the defects in which would be readily discovered by a person experienced in the construction and mechanism of such machines, could they escape liability for injuries resulting therefrom upon the ground that they had discharged the duty in person, and had exercised their best skill and judgment in these respects? Certainly not. Why? Because the exercise of reasonable care required that they should employ a skilled person to examine the machines and pass upon their fitness, and it was gross negligence on their part to rely upon their own judgment in reference to matters about which they were not competent to judge. But, upon the other hand, if they employed a skilled person to make such examination for them, and upon *his* judgment they purchased the machines and placed them in the hands of their servants for use, although, in fact, defective

and unsafe, no liability attaches to the company for injuries resulting therefrom, because they have used reasonable care to guard against the injuries, and the fault, if any, is not theirs, but that of a co-servant."

In Smith *vs.* Flint & Pere Marquette R'y Co., (46 Mich., 258, 264, 1881,) CAMPBELL, J., says :

And in such a business as requires the employment of a multitude of persons beyond the possible constant supervision of either the ultimate or representative principal, there can be no negligence without the failure to use such precautions in choosing agents and guarding against perils as diligent prudence and foresight require. When the principal has done all that can be required of him to prevent risks to his servants, he has done all that he owes them.

In Edwards *vs.* The London and Brighton R'y Co., (4 Foster & Finlanson, 530, 1865,) an action against an employer for an injury caused by the negligence of a fellow-servant, in the position of a foreman, the negligence imputed to the employer being the employment of a person not of competent skill to direct the work, *held* that although evidence that the work required skill, and was being done unskillfully and improperly under his direction, may be some evidence that it was improper to employ him to direct it, it is evidence so slight as to be scarcely sufficient, and is amply met by positive evidence that persons of knowledge deemed him a person of competent skill and experience.

So, in *Gaynor vs.* O. C. and N. R. Co., (100 Mass., 21,) COLT, J., in delivering the opinion of the court, said :

Courts must take notice of that which is matter of common knowledge and experience, and when the plaintiff's case fails to disclose the exercise of *ordinary care*, judged of it in the light of such knowledge and experience, he shows no right to a recovery. Ordinarily, however, it is to be settled as a question of fact in each case, as it arises upon a consideration of all the circumstances disclosed in connec-

tion with the ordinary conduct and motives of men, applying as the measure of *ordinary care* the rule that it must be such care as men of common prudence usually exercise in positions of like exposure and danger. When the circumstances under which the plaintiff acts are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, it is plainly to be submitted to the jury. What is *ordinary care* in such cases, even though the facts are undisputed, is peculiarly a question of fact, to be determined by the jury under proper instructions. It is their judgment and experience, and not of the judge, which is to be appealed to.

Ordinary care is not defined in the charge copied in the bill of exceptions, but it is well known to mean that degree of care which persons of *ordinary care* and prudence are accustomed to use and employ, under the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination, having due regard to the rights of others and the objects to be accomplished.

It is obvious from this definition, that the ordinary care required by the rule, has not only an *absolute*, but also a *relative* signification.

It is to be such care as prudent persons are accustomed to exercise, under the peculiar circumstances of each case. If called into exercise under circumstances of peculiar peril, a greater amount of care is required than where the circumstances are less perilous; because prudent and careful persons, having in view the object to be attained, and the just rights of others, are, in such cases, accustomed to exercise more care than in cases less perilous.

The *amount* of care is indeed increased, but the *standard* is still the same. It is still nothing more than *ordinary care under the circumstances* of that particular case. The circumstances, then, are to be regarded in determining whether *ordinary care* has been exercised. (Cleveland, Columbus & Cincinnati R. R. Co. *vs.* Terry, 8 Ohio St. R., 581.)

In such a case a plaintiff, guilty of negligence, or failing to exercise *ordinary care*, cannot recover for an injury based upon defendant's negligence. It was not sufficient to tell the jury that plaintiff's want of care was simply to be taken

into consideration in determining defendant's liability; for under this rule there is nothing to prevent them from finding liability, though they believed plaintiff, by the exercise of due diligence, might have avoided the injury. This was calculated to mislead, and was hence erroneous. (Spencer *vs.* Ill. Central R. R. Co., 29 Iowa, 59.)

In Gilman *vs.* E. R. R., 10 Allen, 233, GRAY, J., says:

But it is quite as well settled, both in England and America, that a master is bound to use *ordinary care* in providing his structures and engines, and in selecting his servants, and is liable to any of their fellow servants for his negligence in this regard.

In Moore *vs.* Cent. R. R. Co., 24 N. J., 268, (4 Zab.,) the Court held that *ordinary care* is required of both parties.

In State *vs.* R. R. Co., 52 N. H., 528, both parties are held to the use of *ordinary care.*

In Angell on Carriers, (3 Ev.,) secs. 6–11, the general rule is laid down as follows:

Ordinary care or caution is the care or caution which every person of common prudence, capable of doing business, exercises towards his own business.

In Gilman *vs.* Bangor, 38 Maine, 443, *ordinary care* is the degree of care required.

In the case of Railroad Co. *vs.* Jones, (95 U. S., 439,) SWAYNE, J., says:

Negligence is the failure to do what a reasonable and prudent person would *ordinarily* have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done.

In Reeves *vs.* D. L. & W. Ry., (30 Pa. St., 454,) WOODWARD, J., says:

If the injury result from the want of *ordinary care* of both parties, neither has remedy against the other, (page 465.)

The general rule, as enunciated by Judge Cooley in his

work on Torts, (page 674,) recognizes *ordinary care* as necessary on the part of the servant to enable him to recover against the master; and *ordinary care* is required of the master also, to relieve him from responsibility for an injury to the servant.

In M. & C. R. R. Co. *vs.* Whitfield, (44 Miss., 486,) the court uses and adopts *ordinary care* as the proper degree of care.

In Robinson *vs.* W. P. R. R., (48 Cal.,) the degree of care required is stated as *ordinary care.*

A workman or servant, on entering upon any employment, is supposed to know and assume the risks naturally incident thereto; if he is to work in conjunction with others, he must know that the carelessness or negligence of one of his fellow-servants may be productive of injury to himself; and besides this, what is more material, as affecting his right to look to his employer for damages for such injuries, he knows or ought to know that no amount of care or diligence of his master or employer can by possibility prevent the want of due care and caution in his fellow-servants, although they may have been reasonably fit for the service in which they are engaged. It is certainly most just and reasonable that consequences which their servant or workman must have foreseen on entering into an employment, and which due care on the part of the employer or master could in no way prevent, should not be visited on the latter." (Snow *vs.* Housatonic R. R. Co., 8 Allen, 445.)

In *North Pennsylvania R. R.* vs. *Heileman*, 49 *Penn.*, 63, it is said:

That what constitutes negligence in a particular case is generally a question for the jury and not for the court is undoubtedly true, because *negligence is want of ordinary care.* To determine whether there has been any, involves, therefore, two inquiries: *First*, what would have been ordinary care under the circumstances; and *second*, whether the conduct of the person charged with negligence came up to that standard.

In most cases the *standard* is variable, and it must be found by a jury. But *when the standard is fixed, when the measure of the duty is defined by the law*, entire omission to perform it is negligence.

In such a case the jury have but one of these inquiries to make. They have only to find whether he, upon whom the duty rests, has performed it. If he has not, the law fixes the character of his failure and pronounces it negligence.

This long list of authorities might be prolonged indefinitely. They are cited in a way which it is hoped will disclose their abundance without fatiguing the Court. The test of negligence which they present is believed to have universal recognition.

If this test be the true one, the Court erred in imposing a different and higher test. The facts and result of this difference have already been discussed. The circumstances under which the Court insisted on its own expression, and rejected that which all courts prudentially adopt, were such as necessarily to make a marked impression on the jury. They could not but suppose that proper care meant more than ordinary care, and that, however great the ordinary care might be, it was not great enough.

II. The Court erred, further, in confounding the degree of care owed as a duty to passengers with the degree of care owed to employees.

The court went further and transcended an express distinction of law. "The lives of *passengers* and employees on trains depended upon his skill and fidelity, and the defendant was bound to exercise *proper and great care* to get a person in all respects fit for the place."

The duty of care owed by the defendant to its passengers, and that owed by it to its employees, are here expressly made one and the same duty. That they are not in the view of the law the same is too well settled to re-

quire exposition further than by reference to a single case or two. The question of passengers' rights, moreover, was not before the court:

The rule is that a charge, however correct as a proposition of law, should not be given unless it is pertinent to the matter in issue, and justified by the evidence. And that it would be error so to charge, unless it is manifest that the jury could not have been misled by it. (Wright *vs.* Clark, 34 Miss., 117.)

And in Farwell *vs.* B. & W. R. R. Co., 4 Metc., 49, SHAW C. J., says, speaking of degrees of care:

The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, negligence, and skill on the part of themselves and all persons employed by them, and they are paid accordingly.

III. The night operator, through whose fault the plaintiff suffered, was his fellow servant.

Pierce on Railroads (1881) on page 361 says:

The terms common service, or employment, are to be understood in a broad, rather than a limited signification. * * * It is sufficient if they are employed by the same master, and are engaged in the same general purpose or undertaking—the maintenance and working of the railroad, and cases cited in note.

To the same effect, see Slater *vs.* Jewett, 85 N.Y., 61.

In Farwell *vs.* B. & W. R. R., 4 Metc. 49, SHAW, C. J. says:

The loss was sustained by means of an ordinary casuality caused by the negligence of another servant of the company. Under these circumstances the loss must be deemed to be the result of a pure accident like that to which all men, in all employments, and at all times, are more or less exposed, and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy

against the person actually at fault. * * * * When the object to be accomplished is one and the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department, and what a distinct department of duty. It would vary with the circumstances of every case.

In Robertson *vs.* T. H. & I. R. R., 78 Ind., 77, it is held that a brakeman and a telegraph dispatcher are fellow-servants.

In Chapman *vs.* R. R. Co., 55 N. Y., 579, an engineer and a telegraph operator were held fellow-servants.

In Dana *vs.* R. R. Co., 23 Hun., (N. Y.,) 473, an engineer and a telegraph operator were held fellow-servants.

IV. The company was entitled to have the instructions to the jury clear and certain, and also to have them more specific.

Each party has the right to have the jury instructed upon the law of the case *clearly and pointedly*, so as to leave no ground for misapprehension or mistake. (*Muldowney* vs. *The Ill. Central R. R. Co.*, 32 Iowa, 180.)

The charge of the court appears to have been predicated on an *assumed* state of facts not proved before the jury, and, therefore, as we have frequently held, erroneous.

Harrison *et al. vs.* Thompson, 9 Georgia, 313.

But this court cannot refuse to reverse, on account of no injury having been done by a prayer either erroneously granted or rejected, unless the record clearly shows the absence of injury. How can that be shown, when, on the same subject, a correct and an incorrect instruction have been given, there being no means of knowing which had an influence on the decision of the jury.

Haney *v.* Marshall, 9 Md. R., 215.

V. The court erred in refusing to charge that the only knowledge of incompetency for which a company is responsible is such knowledge as it has through agents who have power to employ or remove the person whose incompetency is alleged.

The final point of disagreement between the company's counsel and the court, arose upon the court's refusal to give the following instruction:

To render the carelessness of McHenry the carelessness of the defendant, or to render the defendant liable for the same, it is incumbent on the plaintiff to prove that said McHenry was appointed to or retained in his position as telegraph operator with knowledge on the part of the company, or some officer or agent of the company having the power of appointment or removal, that he was incompetent, or that such knowledge might have been obtained by the use of reasonable diligence on the part of the defendant, or of such officer or agent of the defendant. (Record bottom of 19th page.)

This charge was material and necessary, because the complaint charged, (Record, p. 3,) not only that the night operator was incompetent but that his incompetence was "known to the defendant and its accredited agents."

The court had stated to the jury (charge 11,) that if ("Simpson,") the person who employed the operators, had directed "Waldo" to employ "McHenry," this night operator, and if he had done so in pursuance of this direction, his (Waldo's) knowledge and information of McHenry was the knowledge and information of the defendant.

At the same time the bill of exceptions shows, (Record, p. 10:)

There was no evidence given to the jury tending to prove that Waldo had any authority, independently of said dispatch, to employ said William P. McHenry in said position, or that he had any authority to remove him therefrom after he was so employed; and there was direct proof that Waldo had no power to employ day or night operators.

The effect of the instruction asked was to limit the charge above given, and show that the company was not responsible for knowledge which it had through its agents generally, but only for such knowledge as it had through those of its agents who had power to employ and discharge.

In Malone *vs.* Hathaway, (64 N. Y., 5,) ALLEN, J., says, (page 9):

> When the middleman or superior servant employs and discharges the subalterns, and the principal withdraws from the management of the business, or the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for the neglects and omissions of duty of the one charged with the selection of other servants in employing and selecting such servants and in the general conduct of the business committed to his care.

On same question see—

Smith *vs.* F. and P. M. R. R., 46 Mich., 258.
Cleghorn *vs.* R. R. Co., 56 N. Y., 44.
Gormly *vs.* Vulcan Iron Works, 61 Mo., 492.

The effect of this refusal was to contradict this settled rule of law, and make the company answerable for information which it had through one who had no power to employ or discharge, but was simply the plaintiff's fellow-servant.

To a certain extent this manifest error was acknowledged, when afterwards the court first modified and then gave to the jury one of several instructions prepared by the company's counsel. This modified instruction (Record, p. 21) did include the words "it must be shown that the defendant failed * * * to remove him after his incompetency had come to the knowledge of defendant, OR to some agent or officer of the defendant having power to remove said McHenry."

The alternative here put, plainly fails to meet the issue raised by the refused instruction. We are still told that the

company may have knowledge through an agent who has not the power to remove. The Court refuses to say that the company is responsible for such knowledge only when it comes through those of its agents who have power to remove.

WAGER SWAYNE,
CHARLES B. STUART,
Of Counsel.

Supreme Court of the United States.

THE WABASH RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOHN MCDANIELS.

No. 286.

Brief for Defendant.

Just before day on the morning of the 17th day of August, 1877, near Beldon bridge, between Antioch and Lagro, on the roadway of the plaintiff in error, a collision occured between section 1 of freight train No. 13, going West, and section 6 of freight train No. 16, going East. The defendant, McDaniels, was at his post of duty as brakeman on said train 13, and was caught in the wreck and his left leg crushed so as that it had to be amputated, and he was otherwise greatly injured and damaged.

This action was brought by McDaniels in the U. S. Circuit Court for the District of Indiana, against the plaintiff in error, to recover damages for the injuries, and judgment was had in his favor. To reverse that judgment this action is now being prosecuted upon a writ of error to this Honorable Court.

The complaint avers that the injuries complained of

resulted from and through "the negligence of the defendant and its servants, *who were incompetent, careless, untrustworthy and unskilled in railroading, which was known to the defendant at the time of their employment;*" and more specially, "Willie McHenry, the night operator of telegraph at Wabash, * * * was negligent, incompetent, careless and untrustworthy and unskilled in railroading or telegraphing for railroads; was a mere boy, and by reason of his youth and general habits of life was liable to sleep on his post of duty in defendant's employ in the night time."

Record, pp. 2 & 5.

The Facts.

The facts set forth, as proved in the bill of exceptions, show that *William P. McHenry* was, at the time of the accident in which the plaintiff below was hurt, the night operator of the defendant below at the station at Wabash, Indiana; and that the accident was the direct result of his negligence in going to sleep on duty at that station, and sleeping while section 5, of train 16, going east on the said defendant's road, ran past said *Wabash;* and afterwards mistook section 6 of said train for said section 5, and falsely reported to the train-dispatcher of said defendant, at Fort Wayne, that section 5 of said train had just passed said Wabash going east, but that section 6 thereof had not yet reached said Wabash; and upon such false dispatch said train-dispatcher directed the *first* section of train *thirteen*, going west on said road, and then being at Huntington, to run on to Lagro, whereby said section 6 and 1 were brought into collision, and the plaintiff, who, as a brakeman at his post of duty on said section 1, was injured. There is no controversy about McHenry's negligence, or that the accident in which the plaintiff received his injuries was the direct result of it.

The contention, so far as the facts are concerned, relate to his fitness for the position of night operator at said *Wabash* on said road, and the degree of care and diligence used by the company in his selection and employment. It is maintained by the plaintiff below that he was not fit for the position, and that defendant either knew, or might have known it, when he was employed.

McHenry, it is agreed, was 17 years old in June before the accident, which happened August 17, 1877; that in June, 1876, he entered the office of the Western Union Telegraph Co. of the defendant, at said *Wabash*, as a messenger-boy, and to learn telegraphy under Waldo, who was then in charge of said offices; that his wages were $10 per month, and he paid them all to said Waldo for instructions in telegraphy; that, as such messenger, he was on duty from 7 a. m. to 7 p. m. daily; that while *McHenry* was acting as messenger-boy, on divers occasions he remained in the office with Clough, *alias Wade*, night operator at said *Wabash, until a late hour at night, and on two occasions all night;* that his habits were good, and that he was bright, intelligent, and industrious; and the year previous to his employment as messenger-boy, he stood *first* in a class of nineteen at school. In *June* before the accident *McHenry* was recommended by *Waldo* to *Simpson* as competent and qualified to fill the position of telegraph operator at a way station, such as *Wabash*, on defendant's road, and his appointment recommended by said *Waldo* to *Simpson* in case a vacancy should occur. In addition to these matters, which are admitted to have been proved, *there was evidence given tending to prove a custom among railroads to educate their telegraph operators* while serving as messenger-boys, and to appoint them night operators when they had acquired like knowledge and experience as *McHenry* when he was placed on duty; and that the system had produced satisfactory results, &c.

In regard to the mode of the employment of *McHenry* as night operator at *Wabash*, the Superintendant *Wade*, train dispatcher *Simpson*, *Waldo* and *McHenry* and *John A. McHenry*, testified as follows:

Wade was Division Superintendent of that division of the road when the collision occurred; and said that Simpson had charge of telegraph operators on that division; and employs and discharges them subject to *Wade's* approval.

Simpson, train dispatcher, said that he brought Clough *alias* Wade, night operator, the year previous at *Wabash* to *Ft. Wayne;* and *made use of McHenry to fill* that vacancy; instructed Waldo over the wires to employ *McHenry* as night operator for the Company, *McHenry not being in his reach.*

There was evidence tending to prove that *Waldo* did give *McHenry* instructions in telegraphy; and that *Simpson*, on *Waldo's* recommendation and without seeing him, and upon what he had seen of *McHenry's* skill, from his having occasionally noticed at Ft. Wayne, *McHenry's* manipulations of the wires at *Wabash*, put *McHenry* on duty as night operator at *Wabash*, *August* 7, 1877.

Waldo testified that on August 7, 1877, he received a telegraphic direction from *Simpson*, to put *McHenry* on duty in charge of the telegraph office of defendant at *Wabash*, as night operator *until further orders*, and to do it at once. He did as he was directed, and McHenry took charge of the office August 7, 1877.

McHenry and his father both testified that they had no direct communication with *Simpson* about his employment as night operator at *Wabash;* and that *Waldo* made the arrangement to put him on. And this was all the evidence touching *McHenry's* employment; and there was no evidence that *Waldo* had any authority to employ him, except the dispatch received from *Simpson*, directing him to do so.

There was evidence given that the defendant was acting

under a custom of educating messenger boys in telegraphy, and employing when they were qualified and fit to act as operators.

If this were so, then *Waldo* was the company's school teacher; and the company was directly chargeable with the sufficiency of his education, and training for the position of night operator. *Simpson* is shown to have been the agent of the company for the appointment of operators. If that was so, then, he either appointed upon his own knowledge of the fitness of the appointee, or upon the knowledge of another. If the law required that he should himself know his fitness then, in case of *McHenry*, *Simpson* had no knowledge to justify the appointment. If the law allowed him to rely on others for his fitness, then for the purpose, those others were agents of the company. In other words, if Simpson relied upon *Waldo* then, he was bound for the truth of *Waldo's* statements in regard to *McHenry's* fitness; and the company was also bound. Especially is this true, if the jury believed the custom aforesaid existed. The company claims the benefit of the custom; and they must, therefore, show that they strictly conformed to it. The custom did not relieve from the duty of employing only persons who were competent, trained and otherwise fit as night operators. While a compliance with the custom might afford a presumption of competency and fitness, evidence showing or tending to show want of competency or fitness would leave the jury still free to decide upon the evidence according to their belief. There was abundance of such evidence before the jury.

1. It was testified that *McHenry* had staid with his predecessor as night operator till a late hour several nights, and all night two nights, while he was messenger boy. What company he had was not shown; and there is no evidence that he ever had any training in keeping vigil all night alone.

2. His father did not deem it safe to leave him entirely

to himself; and testifies that he agreed out of Willie's salary to pay *ten dollars* a month to *Waldo*, if he would still give his son attention in his new position after his appointment; and that *Waldo* agreed to take it. *Waldo* denies this; but that leaves the question which the jury had to decide, and they had a right to believe either.

3. Two of the defendant's experts expressly testify, the one as follows: "An operator would have to get accustomed to stay awake at night before he would be skilled."

Record 37.

The other: "*that he would not employ a boy* without knowing something about his capacity to sit up and keep awake; and the only way that he could obtain that information would be by personal knowledge or recommendation."

Record 35.

4. Another of defendant's experts, who swears to the custom of training boys to be operators, says: "When we have vacancies for night operators, and we know of persons who have learned at our offices *to be competent and qualified in every particular, we usually give them place.*"

Record, 33.

5. Another expert, called by defendant, testified: "As to sleeping, the recommendation of their associates is the best we have to go by.

Record, 32.

6. There is no evidence in the record that *McHenry* had ever been trained to stay awake of nights—especially by himself—a very different matter from staying awake in company. Boys not fully developed do not keep vigil well. Older persons are better fit for it. Physiology settles the question. But it is enough to say there was evidence on both sides to go to the jury upon the question; and that their verdict is against the care and diligence bestowed by defendant in appointing *McHeny*. If the question was fairly submitted to the jury by the court, there is no error.

Argument.

The instructions of the court are set out in the record beginning at, or near, the foot of page 37, of the printed record. Instructions 1, 2, 3, 9, 10, 11, 12, were not objected to at the time, and were allowed to pass without exception. They cannot now be considered by this court.

See *M. L. Ins. Co.* vs. *Snyder*, 93 U. S. (3 Otto,) 396.

It is true 11 and 12 are mentioned in the grounds for a new trial and form the basis of No. 11th and 12th respectively, in the assignment of errors; but as they were not excepted or objected to at the time, they cannot now be reviewed by this court.

I. Six of the instructions given are excepted to,—each as a whole. Is any one of these exceptions well taken? The *first* is aimed at the 4th charge given,—is that charge the law, and relevant to the case? If not, why not?

1. It will not be questioned that the position of night operator at *Wabash* was an important position—one of great responsibility." The lives of "passengers and employees depended on his skill and fidelity." In view of such responsibilities, will any lawyer say that the law did not and does not require that "The defendant should *exercise proper and great care* in the selection and employment" of a night operator at that place; and "*get a person in all respects fit for the place?*" Why, Hill, their own expert, testified that when, and only when, they had "found a person to be competent and qualified IN EVERY PARTICULAR, that they gave him a place.

Record, 33.

Surely, defendant did not, in the evidence, strive to outrun the law. But without such evidence on part of defense, the law is clear on the obligation of defendant to use all "*proper* and *great* care to get a person in all respects fit for the

place." What authority questions this obligation? *Proper* care in such case is *great* care; and it is the precise thing to be done. The duty on the part of the company may rest either in contract, or as a duty arising from the relation between it and the plaintiff.

> "The duty or contract is to the result that the servant shall be under no risk from imperfect or inadequate machinery, or other material means and appliances, or from *unskilful* or *incompetent fellow-servants* of any grade. It is a duty, to be affirmatively and positively fulfiled and performed. And there is not a performance of it until there has been placed, for the servant's use, perfect and adequate physical means, and for his helpmates fit and competent fellow-servants; or *due* care used to that end. That some general agent, clothed with the power and charged with the duty to make performance for the master, has *not done his duty at all*, or has not done it well, neither shows a performance by the master, nor excuses the master's non-performance. It is for the master to do by himself, or by some other. When it is done, then, and not until then, is his duty met, or his contract kept"
>
> 49 N. Y., 532–3.

The cases use, as synonymous: "*proper*," "due," and "reasonable" to qualify the care and diligence required by the law in such matters of the master. The diligence required must be in proportion to the danger of the service, and if the master be negligent in making the appointment, he is liable to the injured servant.

> See *O. & M. R. R.* vs. *Collarn*, 73 Ind., 271;
> *Ala. R. R. Co* vs. *Waller*, 48 Ala. Rep., 459;
> Whart. on Evidence, § 48;
> *Patton* vs. *Faulkner*, 31 L. J., Q. B. 30;
> *Gilman* vs. *Railroad & Co.*, 10 Allen (Mass.), 236;
> *Beaulic* vs. *Railroad, &c.*, 59 N. Y., 356;

82 Penn. St., 119 ;
55 *Id.*, 460 ;
20 Maryland, 212 ;
8 Ohio St., 249 ;
22 Ind., 26 ;
28 Mich., 289 ;
62 Ms. Reps., 565.

In regard to the degree of care required, see:
Whart. on Neg., § 785 ; *Id.*, § 48.
Ford vs. *Railroad, &c.*, Co., 110 Mass., 240.

The law does not exact a warranty of a co-servant's fitness and competency, but it does exact *due care* and *diligence* in their selection ; and carries these words, as they may fairly go.

102 Mass., 572 ;
10 Gray, 274 ;
14 *Id.*, 466 ;
8 Allen, 441 ;
10 *Id.*, 233 ;
13 *Id.*, 433, and
110 Mass., 240.

It is the duty of the employers to use "*proper care* and *diligence* to make his machinery safe and fit for use."
Whart. on Neg., § 211.

"*Due care*" is used as the equivalent of "*proper care*," in § 212 of the same treatise. Authorities are abundant that the same degree of care is required in selecting and employing servants, human machines, as in more mechanical contrivances. The servant is not bound to enquire for latent defects in machinery, and just as little into the training and fitness of co-servants, especially when not in his immediate class and line of service.

Whart. on Neg., §§ 221, 222, and 224.

If the defendant below permitted *Waldo*, who taught *McHenry* what he knew about telegraphy at the time of his employment at *Wabash* as night operator, to determine his fitness for such employment, then *Waldo* exercised the defendant's authority in determining his fitness, and was the agent of the company to that end.

> *Ford* vs. *Fitchburg R. R. Co.*, 110 Mass., 240;
> *Lanning* vs. *N. Y. Cent. R. R. Co.*, 49 N. Y., 521;
> *Chicago, &c., R. R. Co.* vs. *Jackson*, 55 Ills., 402.

And *Cooley*, in his work on *Torts*, says:

> "Whosoever is permitted to exercise the master's authority in respect to these matters, is charged with the master's duty, and the latter is responsible for a want of '*proper caution*' on the part of the agent, as for his own personal negligence."
>
> *Cooley on Torts*, 561, and note 1.

Here again it may be observed that *proper caution* is used as the exact equivalent of "due care and diligence," "reasonable care and diligence," "proper care and diligence."

These authorities have been cited here, and these observations submitted, not because they are all applicable to the question made on the fourth instruction, but because they naturally run together. They will not be repeated, but referred to, upon the other instructions.

2. The fifth charge seems unobjectionable in view of the foregoing argument. It was in favor of defendant below to tell the jury that it was not bound to guaranty its servants' fitness or diligence. The case will not be reversed for that; for, 1. It is the law; 2. It is in favor of defendant below. It is true that defendant "was bound to use all *proper diligence* in the selection and employment of a night operator at Wabash," and to discharge him upon discovery of his

incompetency or unfitness. See authorities cited *supra* under 4th charge. There is no error.

3. There are three sentences in the 6th charge. Each is distinct, and states a distinct proposition. If any one of them states a proposition of law correctly, a general exception to the whole will not lie. This principle has been constantly applied to a general exception to a number of instructions together. If distinct propositions of law are placed together under one number, and some of them are proper and the law, and others not, there is no reason why the exception should be held good to all. Now, the *first* sentence of charge 6th is clearly sound, and pertinent to the case. The *second* is obviously correct also. Argument cannot enforce a truism. It is certainly true that proper diligence in every case depends, in part, upon the character and responsibility of the duty to be performed. That cannot be gainsaid. And the 3d sentence is equally as clearly true.

4. The "7th" charge of the court is even more obviously sound. It is difficult for one not having seen the brief of the plaintiff in error to guess what argument may be urged in support of the exception to this charge. We cannot guess it.

5. The first sentence of charge "8th" is clearly with plaintiff in error. It affords no ground of reversal or complaint on his part. The *second* proposition is obviously the law, as laid down in the authorities above cited.

And these are all the charges complained of in the exceptions. *In nullo est erratum.*

II. But defendant requested the court to give the jury three charges, which, as asked, were refused. One, the 3d, was given with the change of the word "*ordinary*," and inserting in its place the word "*proper*," to qualify the *care and diligence* required of the defendant in the employment

of *McHenry*. In has already been seen that there is nothing in the change. The other two charges asked by the defendant were denied Should either have been given? Did the court err in not giving either?

1. The second asserts, 1st. That defendant was *only* bound to exercise *ordinary* care to ascertain the competency and qualification of *McHenry* for the duties of the place to which he was appointed; 2d. The presumption of law is that defendant did its duty in that respect; 3d. Therefore it devolves on plaintiff to prove that it did not exercise *ordinary care*, to ascertain *McHenry's* competency and qualifications prior to his appointment; or, 4th, Retained him in his position after his disqualification or incompetency to perform the duties of the place had come to its knowledge.

This charge ought not to have been given: 1st. It is upon its face the charge of a party to the suit, and shows it. The word "*only*" is not fit for the mouth of an impartial judge. It would have been the language of fairness with "only" omitted. The defendant was bound *to exercise proper care* and diligence; that was as far as the law should have gone. 2d. There is in the charge such a use and shifting of the words "competency" and "qualifications" and "incompetency" and "disqualifications," as would have tended to mislead and confuse the jury. 3d. The charge is argumentative, and for that reason unfit to be given; 4th. It was substantially and fairly given in charges, given on its own motion by the court. Thus, it was stated to the jury in Charge "8," 1st. "That the presumption is that the defendant exercised proper diligence in the employment of *McHenry*;" and, 2d, "That the burden of showing the contrary was upon the plaintiff." And, again, in Charge "3," "The burden is on the plaintiff of showing that the defendant did not exercise proper diligence in selection and employment of *McHenry*." So these two charges, "3" and "8," given by the court, show that the defendant

had the benefit of "2, 3," and "4" in the analysis of defendant's charge "1." As already seen, the word "*ordinary*" was not so apt as the words "proper" and "reasonable," employed by the court. The defendant nothing lost by the denial of charge one.

It was the duty of the railroad company "to exercise *all reasonable care* in procuring sound machinery and *faithful* and *competent* employees; and although they are liable for the neglect of this duty, yet, after having performed it, they are not liable to a servant for injuries occasioned by the neglect of his co-servants engaged in the same general business, even though the negligent servant be superior in grade to the one injured"

39 N. Y., 478.

In view of such authority, would the limitation upon the care and diligence indicated by the words "*only ordinary*" have fairly expressed the rule? We think not. If otherwise than it was expressed in other charges given by the court, and was, therefore, properly refused.

2. The *first* of the three was refused without error. This charge asks the court to instruct the jury as follows: 1st. That in order to charge the Company with the carelessness of McHenry, the plaintiff must prove that he was appointed or retained in his place as night operator, with the knowledge on the part of defendant, or some officer or agent of it, having power of appointment or removal, that he was incompetent: Or, 2, That such knowledge might have been obtained by the use of reasonable diligence on the part of the Company, or such officer or agent.

Was this the law? Did not the evidence given by the defendant itself shut the door in the face of this charge? It offered evidence to prove and tending to prove a custom on the part of the road to educate its own telegraphers—raising them from messenger boys; that the duty of in-

struction in telegraphy was commited to the local operator, where boy-messenger was employed; that when "he had "learned at their office to be *competent* and *qualified* IN "EVERY PARTICULAR, they usually gave them a place." (*Hill's Testimony, p. 33;—Printed Record 15*). Now, if this custom was established, then, as a part of it, *Waldron's* testimony must go along. He testified that, "it is always customary to keep from one to a half a dozen boys at several telegraph stations on the line, learning the telegraph business for the purpose of filling vacancies in the telegraph offices for day and night service. These young men, *when recommended by the operator who taught them*, and indorsed by the train despatcher are appointed from 15 to 16 years of age and upwards, &c." (See *Waldron's teseimony, Record 32; Printed copy*, 14). Now, if the charge under consideration is the law, what becomes of the liability of the Company for the negligence of those boys thus educated and appointed, in any case of an injured employee? It is at an end. For the charge is predicated only of officers having the power of appointment, or removal. *Waldo, McHenry's* teacher had no such power; *Wade*, superintendent of that section of the road, swears that *Waldo* had no such power. Yet, under the pretended custom, he had the power of instructing, and giving a recommendation to his pupil, upon which *Simpson*, the train despatcher, could appoint,—and yet if deceived in regard to the qualifications and fitness by *Waldo*, the Company could repudiate the act and knowledge of *Waldo*, their own agent for instruction and recommendation—and pleading the ignorance of *Simpson* of McHenry's unfitness and incompetency, escape from all responsibility. Such shuffling can have no sanction here. Especially, when there was evidence that McHenry was not sufficient for his position; that *Waldo* admitted it, in agreeing to supplement his insufficiency, and to take ten dollars of his salary monthly

for doing so; and when there is no evidence that he had had any training in keeping vigil, and so fitting himself for his solitary watch every night from 7 o'clock P. M., until 7 o'clock A. M., every morning. And yet without this training and testing, their own experts testify, he ought not to have been trusted. Even *Waldo* is not shown to have recommended him as fit in anything but telegraphy; and *Wallick* and *Waldron* and *Barton* speak of the unfitness of a boy for night operator "until something "was known about his capacity to sit up and keep awake; "and the only way the appointing agent could obtain that "information would be by personal knowledge, or recom-"mendation:" and *Barton* said: "an operator would "have to get accustomed to stay awake at night, before he "would be skilled."

The whole case shows that *McHenry* had no training in this respect, and there was no recommendation that he had; and if there was, it was from *Waldo*, whose knowledge, as the company's teacher of telegraphy, and recommender of boys taught, was the company's knowledge, and binds the company on the point of contention.

But it is enough that the charge excluded any possible chance for an employee of a company, under any possible state of facts, to recover for injuries received for the employment of an unfit and incompetent operator.

The whole ground of complaint, upon the instructions offered and refused or given, seems to hang upon the adjective qualifying "care," or "diligence." The plaintiff contends that the adjective "ordinary" should have been given by the court.

The exhaustive case of *Hough* vs. *The Texas Pacific Railway*, 100 U. S. (10 Otto), p. 213, was before the court, and the principle therein enunciated was strictly followed by the lower court. Nowhere in that opinion are the words "ordinary" care or diligence used, and the court below re-

jected all instructions tendered in which such phraseology was embraced.

It has heretofore been shown that the master is required to use the same diligence, in the selection of co-servants, that he is required to do in supplying proper machinery.

49 N. Y., 532–3.

The court, in the case of *Hough* vs. *Pacific Railway*, *supra*, page 217, says: "The master is bound to observe *all* the care which prudence and the exigencies of the situation require;" and that the master shall "not be wanting in *proper* care." Hence, the court below, in the fourth instruction, used the term "proper and great care." This court, also, in same case, *supra*, page 220, approves Wharton's definition where he uses the words "*proper* care and diligence" and "*due* care." Hence, the lower court uses these terms as more appropriate than "*ordinary* care and diligence," insisted upon by plaintiff in error.

Finally, in the language of this court—

> "It is not error for a court to refuse to give an extended series of instructions, even though some of them may be correct in the propositions of law which they present, if the law arising upon the evidence is given by the court with such fullness as to guide correctly the jury in its findings, as was the case here; nor is a judgment to be set aside because the charge of the court may be open to some verbal criticisms, in particulars considered apart by themselves, which could not when taken with the rest of the charge, have misled a jury of ordinary intelligence."

Unless the plaintiff in error can assign error generally for the over-ruling of the motion for a new trial, there is no error complained of available here, except that assigned upon the giving and refusing of the charges above set forth. That the over-ruling of that motion is not assignable as error is settled.

M. S. Ins. Co. vs. *Snyder*, 93 U. S., 396;
Pomroy vs. *Bank of Indiana*, 1 Wall., 592;
Railway Co. vs. *Heck*, 12 Otto., 120.

It may be taken for granted, therefore, that the matters specified as reasons for a new trial in the motion therefor, although the over-ruling of that motion is assigned for error, are not here for consideration.

Not having seen the brief for the plaintiff in error, we cannot tell the scope of their argument. It will hardly be contended that the question of excessive verdict is brought up for a review here when it is raised in the assignment of errors in no way except in assigning that the overruling of the motion for a new trial was erroneous.

But there is another sufficent reason why the question of excessive damages is not fairly before this court for reconsideration. The facts in relation to the injuries of the defendant in error are not fully set forth in the record either as admitted or otherwise. It is impossible for this court to know, from the record, the extent or nature of his injuries at the hands of the plaintiff in error. It is shown, indeed, that he lost a leg; but the record shows that he was otherwise hurt and injured, but does not disclose the nature and extent of such hurts, or what sufferings they had inflicted, or were likely yet to inflict upon him. How can the court, in ignorance of the all damages sustained, revise the verdict of the jury, who had full knowledge of all, and acted upon the same.

But if this court is to review the question of excess of damages, then we desire to call the court's attention to some authorities.

The general approved rule upon that subject is that this question is one for the jury, and its verdict will not be disturbed "unless the damages are so great as to strike the mind at first blush as having been superinduced by passion or prejudice."

4 Littell, 118;
2 Marsh, 365;
14 Iowa, 364;
26 Georgia, 256;
2 Gill, 436;
3 Dana, 582.

In case of *Rockwell* vs. *Third Ave. Railroad*, 64 Barb., 438 (1873): plaintiff's foot and ancle severely hurt; confined to his bed for 6 weeks; slightly lame; verdict of $12,000; verdict sustained as not excessive.

Penn. R. R. Co. vs. *Allen*, 53 Pa., 276: plaintiff received severe injuries, but not permanent; verdict, $10,000; sustained.

Farish vs. *Rigle*, 11 Grattan (Va.), 703: plaintiff's leg broken; head severely cut and bruised; no permanent injury; by stage accident; verdict, $9000; sustained.

Boyce vs. *California Stage Co.*, 25 Cal., 460: jaw broken; shoulder dislocated; danger of life; verdict, $16,500, sustained.

Fair vs. *L. N. W R. R. Co.*, 21 L. T. Rep., 326: hearing impaired; paralyzed partially in lower extremities; a cripple; verdict, $26,250, sustained.

Chaphin vs. *N. O. C. R. R. Co.*, 17 La. Ann., 19: plaintiff lost leg—and other injuries; verdict, $25,000, sustained.

Benson vs. *N. Y. & E. R. R. Co.*, 15 N. Y., 415: severe injuries, but no loss of limb; verdict, $14,000, sustained.

Walker vs. *Erie R. W. Co.*, 63 Barb., 260: plaintiff received severe injuries; had some teeth knocked out, and suffered greatly some three weeks; verdict, $20,000, sustained.

In the light of the foregoing authorities, and many others of like character, the $15,000 allowed McDaniels for being made a cripple for life, and otherwise greatly injured and damaged, is not excessive.

It will be borne in mind, also, by the court that the increased value of every article of clothing and subsistence, and the greater cost of living, &c., has rendered the same amount of money of less value than formerly.

In many of the authorities upon this question, much stress is properly placed upon the fact that the trial Judge has approved the verdict. In *Reed* vs. *P. & A. L. I. Co.*, 58 Mo., 421, the court says.

> "The trial courts have opportunities which we have not. In witnessing and presiding over the trial, they are put in possession of facts which we cannot possibly attain. They see the witnesses, can form an opinion respecting their veracity, can observe whether they are biased or prejudiced, can notice their willingness or unwillingness, and a great many other circumstances which it is impossible to transfer to paper. They can also form a correct conclusion whether any improper influences operated on the jury in pronouncing the verdict."

To the same effect are the cases of—

Alley vs. *Hampton*, 2 Dev., 11;
Young vs. *Houston*, 3 Dev., 55;
McRay vs. *Silby*, I Ire., 118;
Simpson vs. *Pittman*, 13 Ohio St., 367;
Carr vs. *Henderson*, 2 Binney, 108;
Blosser vs. *Harchbarger*, 21 Grattan, 214;
Hill vs. *Peyton*, 22 Grattan, 570.

It will be observed that the verdict in the case at bar, upon a full hearing, was not only rendered by a competent jury of good men, but was approved by the presiding judge at the trial, who is no less distinguished person than Hon. Walter Q. Gresham, the present Postmaster General of the United States.

It is not believed that the verdict of the jury will be disturbed for excess or any other cause. An affirmance of the judgment, with interest and damages, is respectfully asked.

E E. McKay,
Wm. Stone Abert, and
Gordon & Shepard,
Of Counsel for Defendant.

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17-454

IN THE

Supreme Court of the United States.

THE WABASH RAILWAY COMPANY,
Plaintiff in Error,

against

JOHN MCDANIELS,
Defendant.

No. 286.

Brief for Defendant.

This Court held, in appeal of *Lucas* vs. *Brooks*, 18 Wallace, p. 456, that the 7th assignment of error was erroneous. The Court say:

> "It avers simply that the Court below erred in giving the instructions, which were given to the jury on its own motion—that is, in the general charge—in lieu of the instructions asked for by the parties; but in what the error consisted, or in what part of the charge it is contained, is not specified. That, under the 21st rule, this is an insufficent assignment is very plain."

The Court refused to consider the question.

Now, in the case at bar, all the assignments of error are open to the objection above, and numbers 11 and 12 of the assignment of error, relate to instructions which *were not excepted to at the time* they were given by the Court (see p[illegible] 26 and 19 of the Record).

The case should be affirmed for want of errors assigned.

There is no error, and the judgment should be affirmed, as the case conforms to principles announced in *Hough* vs. *Pacific Railway*, 100 U. S., (10 Otto) p. 213.

E. E. MCKAY and
WM. STONE ABERT,
of Counsel for defendant.